No. 10419

United States

Circuit Court of Appeals

For the Ninth Circuit.

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 480

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Southern District of California, Central Division

Criminal No. 15728

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD F. ZAP and LLOYD SCOTT,

Defendants.

INDICTMENT

United States of America,
Southern District of California,
Central Division—ss.

Count I

The Grand Jurors of the United States of America, duly impaneled, sworn and charged in the District Court of the United States for the Southern District of California, Central Division, at the September 1942 Term of said Court, and inquiring for said District, do upon their oaths find and present as follows:

1. At all times herein mentioned the defendant Edward F. Zap was and is a resident of and was doing business within the Southern District of California, Central Division, under the firm name and style of E. F. Zap Aeronautical Engineers.

2. At all times herein mentioned the defendant Lloyd Scott was a Lieutenant Commander in the United States Navy and Assistant [2] Chief In-

spector of Naval Aircraft, Eleventh Naval District.

3. At all times herein mentioned the United States Navy was a duly constituted and lawful department and agency of the United States of America, and it was a lawful function and duty of the said Navy to design and test naval airplanes.

4. The United States of America on or about the 22nd day of March, 1941, and on or about the 15th day of May, 1942, in the City of Los Angeles, State of California, did make and enter into certain contracts with the said Edward F. Zap. Said contracts designated and knows as NXs 4105 and 83142 provided among other things that the said Edward F. Zap should engineer, design and build experimental aircraft and aircraft appliances for the United States Navy in consideration of the undertaking of the United States of America to compensate said Edward F. Zap by the payment of a fixed sum or sums for a certain portion or portions of the work to be done and by the payment of other portions on the basis of cost plus a fixed fee to said Edward F. Zap.

5. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, all within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to an officer in the Naval Servige of the

United States of America a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious and fraudulent, in the manner and by the means hereinafter set forth, to wit:

6. On or about the 23rd day of September, 1942, the defendants Edward F. Zap and Lloyd Scott did present to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a claim which falsely purported to be for reimbursement [3] for expenses incurred pursuant to the aforementioned contract NXs 4105. Said expenses purported to be for the conducting of certain wind tunnel tests by the University of Washington, under the terms and provisions of said contracts.

7. Defendants Edward F. Zap and Lloyd Scott well know that said claim was false and well knew that said tests had not been performed by said University of Washington pursuant to contract NXs 4105 or any other contract with the United States Navy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count II

8. And the Grand Jurors aforesaid upon their oaths do hereby further indict and present: All of the allegations contained in Paragraphs numbered 1, 2, 3, and 4 of Count I of this Indictment are

hereat realleged and incorporated by reference as if here set forth in full.

9. Prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify, conceal, and cover up by trick, scheme, and device a material fact and make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of a department and agency of the United States of America, namely, the United States Navy, in the following manner and by the following means, to wit:

10. Prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did falsely represent to Hilton Byers who was then and there a United States Naval Cost Inspector that a bill presented by the University of Washington for certain wind tunnel tests was incurred pursuant to the [4] aforesaid contract NXs 4105 with the United States Government.

11. That said representations were false in that said wind tunnel tests had not been performed by the University of Washington, or anyone else, pursuant to said contract NXs 4105, or any other contract to which the United States was a party. Said

defendants Edward F. Zap and Lloyd Scott well knew that said representations were false, and that said bill for expenses had not been incurred pursuant to said contract NXs 4105, or any other contract to which the United States was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count III

12. And the Grand Jurors aforesaid upon their oaths do hereby further indict and present: All of the allegations contained in Paragraphs numbered 1, 2, 3, and 4 of Count I of this Indictment are hereat realleged and incorporated by reference as if here set forth in full.

13. Prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and use and cause to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit knowing the same to contain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department or agency of the United States of America, namely, the United States Navy in the following manner and by the following means, to wit:

14. Prior to the presentment of this Indictment

and within one year thereof, defendants Edward F. Zap and Lloyd Scott did apportion and cause to be entered upon the books and records of said Edward F. [5] Zap false entries of and pertaining to sums of money paid to the University of Washington for conducting wind tunnel tests in such a manner as to falsely reflect and falsely represent that said moneys had been paid pursuant to the aforesaid contract NXs 4105 with the United States of America. That said entries upon said books and records were false in that said sums of money had not been paid to the University of Washington, or anyone else, for conducting said wind tunnel tests for the benefit of the United States under said contract No. NXs 4105, or any other contract to which the United States was a party. That said books and records of said Edward F. Zap were matters within the jurisdiction of the United States Navy, in that by the terms and conditions of said contracts between the United States Navy and said Edward F. Zap, said books were subject to scrutiny of and inspection by said United States Navy; that defendants well knew that said books and records of Edward F. Zap were to be inspected by the United States Navy for the purpose of determining the costs incurred by said Zap in performing said contracts.

15. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that said book entries were false and that said moneys had not been expended pursuant to said contract NXs 4105; or

any other confract to which the United States was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count IV

16. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if here set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

17. That on or about the 16th day of October, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdiction of this Court and within the Southern District [6] of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a false claim, knowing the same to be false, fictitious and fraudulent, in the following manner and by the following means, to wit:

18. On or about the 16th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did make and present a claim for $4,000 upon the United States Navy for payment by presenting

same to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California. That said claim falsely purported to be for expenses incurred by said defendants in paying William H. McAvoy for services falsely therein set forth to have been rendered by said McAvoy as a test pilot of aeronautical equipment pursuant to the aforementioned contract 83142. That said claim was false in that the sum of money actually paid to said William H. McAvoy for said services was $2,375, and no more, and not $4,000, as therein set forth.

19. Defendants Edward F. Zap and Lloyd Scott, well know that in fact said William H. McAvoy had been paid by said defendants the sum of approximately $2,375, and no more, for the said services pursuant to contract 83142 and that no other and further expenses had been incurred by said defendants for the services of said William H. McAvoy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count V

20. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if here set forth in full each and every allegation and statement contained in Paragraph 1, [7] 2, 3, and 4 of Count I of this Indictment and do further present and indict:

21. That on or about the 23rd day of September, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdic-

tion of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and cover up by trick, scheme, and device, a material fact and make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of a department or agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

22. On or about the 23rd day of September, 1942, defendants Edward F. Zap and Lloyd Scott did falsely state and represent to Hilton Byers, who was then and there the United States Navy Cost Inspector, that the sum of $4,000 had been paid to William H. McAvoy for acting as test pilot in conducting certain tests pursuant to said contract 83142 and did present to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000 endorsed by said William H. McAvoy. That defendants had previously presented to said McAvoy a check in blank and requested said McAvoy to endorse the same. That said McAvoy did so endorse the same, and thereafter the defendants filled the same in in the figure of $4,000, and thereafter the defendants presented the same to the bank upon which it was drawn for payment, and received payment thereon, and thereafter presented to said Navy Cost Inspector said check, cancelled, in the sum of $4,000 and endorsed by said William H. McAvoy, as aforesaid.

23. Defendants Edward F. Zap and Lloyd Scott well knew that said McAvoy had been paid approximately $2,375, and no more, for conducting said test flights and that no other further sums had been [8] incurred for and on account of said test flight expenses, and defendants Edward F. Zap and Lloyd Scott well knew that said cancelled check for $4,000 had been endorsed by said William H. McAvoy while the said check was blank and before said figure of $4,000 had been placed thereon. All of which is contrary to the form of statute in such case made and provided and against the peace and dignity of the United States.

Count VI

24. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

25. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, and within the jurisdiction of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and felonously make and use and caused to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit, knowing the same to contain fraudulent and fictitious statements and entries in a matter within the juris-

diction of a department and agency of the United States, namely; the United States Navy, in the following manner and by the following means, to wit:

26. On or about the 23rd day of September, 1942, defendants Edward F. Zap and Lloyd Scott did induce William H. McAvoy to endorse a blank check and did later fill in said check for the sum of $4,000.

27. And further said defendants Edward F. Zap and Lloyd Scott did present said check in the sum of $4,000 to the bank upon which it was drawn for payment and received payment thereof and did thereafter falsely enter the sum of $4,000 upon the books and records of Edward F. Zap as having been paid to said William H. McAvoy as payment [9] for his services as a test pilot pursuant to said contract 83142. That said defendants then and there well knew that said books and records of Edward F. Zap were matters within the jurisdiction of the United States Navy and were to be submitted to and inspected by said United States Navy in order to determine the cost to said Edward F. Zap of performing said contracts. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that said entries were false and that said William H. McAvoy had been paid the sum of approximately $2,075, and no more, for his services and all thereof as test pilot pursuant to said contract 83142 and that no other and further sum had been incurred for and on account thereof. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count VII

28. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

29. That on or about the 9th day of October, 1942, at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the naval service of the United States, a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious, and fraudulent in the following manner and by the following means, to wit:

30. On or about the 9th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did present a false claim to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San [10] Diego, California, who was then and there an officer of the United States Navy, for reimbursement for expenses falsely stated thereon to have been incurred pursuant to the aforementioned contract 83142, for a trip to Daggett, California, for the purpose of making test flights on a naval airplane.

31. Defendants Edward F. Zap and Lloyd Scott well knew that said falsely claimed expenses had not been incurred or expended by them under and pursuant to said contract 83142, or any other contract to which the United States was a party, and the defendants then and there well knew that in truth and in fact said expenses were fictitious and had not been incurred or expended by them under and pursuant to any contract to which the United States was a party, or otherwise or at all. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count VIII

32. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

33. That prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and cover up by trick, scheme, and device a material fact and make a false and fraudulent statement and representation in a matter within the jurisdiction of a department and agency of the United States,

namely, the United States Navy, in the following manner and by the following means, to wit:

34. Prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did falsely [11] represent to Hilton Byers, who was then the Navy Cost Inspector, that certain expenses had been incurred by said Edward F. Zap in connection with a trip to Daggett, California, pursuant to the said contract 83142 for the purpose of testing the design of an airplane and of the parts thereof.

35. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that the said expenses had not been incurred by said Edward F. Zap under and pursuant to the terms and conditions of said contract 83142, or otherwise or at all. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count IX

36. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

37. That prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly,

wilfully, and feloniously make and use and cause to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit, knowing the same to contain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department and agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

38. Prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did cause to be entered upon the books and records of the said Edward F. Zap entries falsely purporting to reflect and show that there had been incurred on a trip to Daggett, California, for the purpose of testing the [12] design of a Navy airplane pursuant to the said contract 83142 expenses in the sum of $1260. That the defendants then and there well knew that said books of said Edward F. Zap were matters within the jurisdiction of the United States Navy and that said books of said Edward F. Zap were to be submitted to and inspected by said United States Navy to determine the cost to said Edward F. Zap of performing said contracts. That said defendants did falsely represent to the Naval Cost Inspector that said entries were true; and did falsely represent to said Naval Cost Inspector that such false entries reflected actual expenses by said defendants incurred and paid under the terms and provisions of said contract 83142.

39. Said defendants Edward F. Zap and Lloyd Scott well knew that such entries were false and such representations were false and that in fact said defendant Edward F. Zap had incurred expenses amounting to approximately $600, and no more. All of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count X

40. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

41. That on or about the 4th day of May, 1942, at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for approval and payment to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a false claim, well knowing the same to be false, fictitious, and fraudulent in the following manner and by the following [13] means, to wit:

42. On or about the 4th day of May, 1942, defendants Edward F. Zap and Lloyd Scott did pre-

sent a false claim for reimbursement to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service. That said claim was false in that it purported to be a claim for moneys paid to one L. E. Reed pursuant to said contract 83142 for the construction and fabrication of certain model airplane work commonly known as "mock-ups."

43. Said defendants Edward F. Zap and Lloyd Scott well knew that said "mock-ups" had not in fact been constructed pursuant to contract 83142 and that said "mock-ups" had not been constructed by the defendants pursuant to any other contract with the United States Navy, and defendants well knew that in truth and in fact said "mock-ups" had been used in certain private experiments of defendant Edward F. Zap. All of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count XI

44. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count 1 of this Indictment and do further present and indict:

45. That prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal

and cover up by trick, scheme, and device a material fact and make and cause to be made false and fraudulent statements and representations in a matter within the jurisdiction of a department and agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

46. On or about the 4th day of May, 1942, said defendants [14] Edward F. Zap and Lloyd Scott did falsely represent to Hilton Byers who was then the Navy Cost Inspector that a receipt for moneys paid by them in the sum of $1100 given to defendants by L. E. Reed was a receipt evidencing expenses incurred and paid by said defendants pursuant to said contract 83142. That defendants well knew that said receipt was a matter within the jurisdiction of the United States Navy, and that the same was to be inspected by the United States Navy in order to determine the cost to said Edward F. Zap of performing said contract.

47. Defendants Edward F. Zap and Lloyd Scott well knew that said representations were false in that not all the work paid for with the moneys for which said receipt was given by said Reed was done pursuant to and in performance of contract 83142 and that approximately $700 of said work was done upon certain private experiments of defendant Edward F. Zap and not pursuant to any contract to which the United States Government was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count XII

48. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

49. That prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and use and cause to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit, knowing the same to contain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department and agency of the [15] United States, namely, the United States Navy, in the following manner and by the following means, to wit:

50. Prior to the presentment of this Indictment and within one year thereof the defendants Edward F. Zap and Lloyd Scott did falsely enter and apportion upon the books of said defendant Edward F. Zap false entries purporting to reflect and show sums of money amounting to approximately $1100 to have been paid to L. E. Reed by said Edward F. Zap for the fabrication of certain "mock-ups" in such a way as to falsely reflect, show and represent upon said books that said "mock-ups" had been ordered and paid for pursuant to contract 83142. That

defendants well knew that said books and records of said Edward F. Zap were matters within the jurisdiction of the United States Navy and that said books and records of said Edward F. Zap would be submitted to and inspected by the United States Navy to determine the costs of said Edward F. Zap in performing said contracts.

51. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that in truth and in fact said "mock-ups" had not been ordered and said services had not been performed pursuant to said contract 83142, or any other contract to which the United States was a party, and that $700 of the money so expended for and on account of said "mock-ups" had been expended pursuant to and on account of certain experiments being conducted by Edward F. Zap for and on his own account and not pursuant to any contract to which the United States Government was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count XIII

52. And the Grand Jurors upon their oaths do hereby reallege and reincorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict that prior to the presentment of this Indictment and within three [16] years thereof at Los Angeles, California, in the Southern District of California, Central Division, and at other places

within the jurisdiction of this Court, to the Grand Jurors unknown, Edward F. Zap and Lloyd Scott, the defendants herein, well knowing all the premises of aforesaid, did wilfully, unlawfully, feloniously, and wrongfully conspire, combine, confederate, and agree together and with each other and with divers other persons, to the Grand Jurors unknown, to defraud the United States of America by making false and fictitious entries upon the books and records of the Edward F. Zap Aeronautical Engineers which were to be submitted to and inspected by the United States Navy to determine the costs of said Edward F. Zap in performing said contracts and by preparing false and fictitious receipts and vouchers to be presented to the Navy Cost Accountants and by making false distributions and apportionments and allocations of expenses incurred by said Zap Company and by charging expenses incurred for labor and materials to those accounts upon which the Navy had agreed to compensate the said Edward F. Zap upon the basis of cost-plus-a-fixed-fee and by making and preparing false claims and vouchers to be presented for payment to the United States Navy upon the basis of the aforesaid false and fictitious entries, in the manner and means hereinafter set forth.

53. That is to say: Said defendant Edward F. Zap in his position as owner and manager of the said company did instruct the office employees to enter and charge upon his books cost of the labor performed by his employees upon projects which

were for his own account and upon projects which were being performed by the Navy upon a fixed fee basis to projects which were being performed on such cost-plus-a-fixed-fee basis for the United States Navy, under contracts therewith. That said employees did so enter such false and fictitious charges upon the said books of said Edward F. Zap in accordance with such instructions.

54. And as a further part of said conspiracy defendant Edward [17] F. Zap did instruct the bookkeepers of his said company to charge expenses incurred pursuant to projects which were being performed on his account and projects being performed upon a fixed fee basis to projects being performed on a cost plus a fixed fee basis. That said bookkeepers did so enter such false and fictitious charges upon said books of said Edward F. Zap in accordance with said instructions.

55. It was a further part of said conspiracy that defendant Lloyd Scott in his position as Assistant Chief Inspector of Naval Aireraft and as a Lieutenant Commander would, and said Lloyd Scott did, certify to the correctness of the above set forth incorrect entry and charging of labor costs and the above set forth incorrect charging entry of expenses incurred, and it was a further part of said conspiracy that said defendant Edward F. Zap would, and said Edward F. Zap did, pay to said defendant Lloyd Scott sums of money at different times and from time to time. And it was a further part of said conspiracy that defendant Edward F.

Zap would, and said Edward F. Zap did, make claims to the United States Navy for payment upon the basis of the hereinabove described false entries in the books and records of said Edward F. Zap.

56. And it was a further part of said conspiracy that defendant Lloyd Scott would, and said Lloyd Scott did, certify to the correctness of the above-mentioned false claims against the United States Navy.

Overt Acts

57. In pursuance of said conspiracy and to effect the objects thereof, the defendants did prior to the presentment of this Indictment and within three years thereof in the Southern District of California, Central Division, perform the following overt acts:

58. On or about the 30th day of October, 1942, defendant Edward F. Zap did present to the United States Navy for payment a false claim or voucher in the amount of $25,440 for labor falsely stated therein to have been performed pursuant to Item No. 1 (one) of con- [18] tract NXs 4105.

59. And in further pursuance of said conspiracy and to effect the objects thereof, on or about the 9th day of October, 1942, defendant Lloyd Scott falsely certified that a bill presented by said Edward F. Zap for expenses therein stated to have been incurred by said Edward F. Zap upon said test trip to Daggett, California, in the sum of $1260 was true and correct and justly owing and had been incurred by said Edward F. Zap in performing said contract 83142.

60. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

A true bill.

Dated: November 25, 1942.

ROY D. BAILEY
Foreman

THURMAN ARNOLD
Assistant Attorney General

WENDELL BERGE
Assistant Attorney General

TOM C. CLARK
Chief, War Frauds Unit

JAMES E. HARRINGTON
Special Assistant to the Attorney General

GEORGE R. MAURY
Special Assistant to the Attorney General

WALTER S. BINNS
Special Assistant to the Attorney General

LEO V. SILVERSTEIN
United States Attorney for the
Southern District of California

[Endorsed]: Filed Nov. 25, 1942. [19]

MINUTE ORDER OF NOVEMBER 25, 1942

At a stated term, to wit: The September Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 25th day of November in the

year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

An Indictment having been presented to the Court in this cause by the Foreman of the Grand Jury and ordered filed, upon motion of James E. Harrington, Esq., Special Assistant to the Attorney General, appearing for the Government, it is ordered that the bond of the defendant Edward F. Zap be and it hereby is fixed in the sum of $25,000.00, and that the bond of the defendant Lloyd V. Scott be and it hereby is fixed in the sum of $10,000.00, and that Bench Warrants be issued for the apprehension of said defendants. [20]

MINUTE ORDER OF NOVEMBER 27, 1942

At a stated term, to wit: The September Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 27th day of November in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on ex parte; James E. Harrington, Special Assistant to the Attorney General,

appearing in behalf of the Government; Geo. I. Devore, Esq., appearing specially in behalf of the defendant Edward F. Zap; it is ordered that this cause be placed on the calendar for November 28, 1942, at 9:30 A. M. for hearing application of defendant Zap for reduction of bail. [21]

MINUTE ORDER OF NOVEMBER 28, 1942

At a stated term, to wit: The September Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 28th day of November in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on before the Court for hearing on oral application of defendant, Edward F. Zap, who is present in Court in custody, for reduction of bail; George R. Maury, Esq., Special Assistant to the Attorney General, appearing in behalf of the Government; George I. Devore, Esq., appearing specially in behalf of the defendant for this motion; Attorney Devore argues in support of oral application of defendant Zap for reduction of bail; Attorney Maury makes a statement.

Edward Frank Zap, the defendant, is called, sworn, and testifies on examination by the Court.

It is ordered that this matter be continued to November 30, 1942, at 2 P. M. for further hearing.

[22]

MINUTE ORDER OF NOVEMBER 30, 1942

At a stated term, to wit: The September Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 30th day of November in the year of our Lord one thousand nine hundred and forty-two,

Present: The Honorable Harry A. Hollzer, District Judge:

[Title of Cause.]

This cause coming on for further hearing on application of defendant Edward F. Zap for reduction of bail; and for arraignment and plea; James E. Harrington, Esq. and George R. Maury, Esq., Special Assistants to the Attorney General, appearing in behalf of the Government; George I. Devore, Esq., appearing specially for the motion in behalf of the defendant; Samuel Goldstein, Court Reporter, being present and reporting the proceedings; the defendant Edward F. Zap being present in Court in custody, now states his true name to be as charged in the Indictment, and waives the reading of the Indictment; it is ordered that the matter

be continued to December 7, 1942, at 11 A. M. for plea.

The defendant, Edward F. Zap, is called, sworn, and testifies re application for reduction of bail, on examination by Attorneys Devore and Maury; it is ordered that bail be reduced to $7,500.00 as to defendant Zap. [23]

MINUTE ORDER OF DECEMBER 7, 1942

At a stated term, to wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 7th day of December in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on for arraignment and plea of the defendants Edward F. Zap and Lloyd Scott; Walter Binns, Esq., Special Assistant to the Attorney General, appearing for the Government; Morris Lavine, Esq., appearing as counsel for the defendant Zap; Harry G. Balter, Esq., appearing as counsel for defendant Scott; James Marquardt, Court Reporter, being present and reporting the proceedings; defendant Zap being present in Court on bond now states his true name to be as charged

in the indictment; defendant Scott states his true name to be Lloyd V. Scott; both defendants waive the reading of the indictment; Attorney Lavine asks for a two weeks' continuance for plea and for hearing any demurrer or motion; it is ordered that this matter be continued to December 21, 1942, at 10 A. M. for plea and hearing on any motion or demurrer, and further ordered that any such motion or demurrer be filed by December 16, 1942. [24]

(Printer's Note): Demurrer to Indictment is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 102 herein.

(Printer's Note): Minute Order of December 18, 1942, is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 109 herein.

MINUTE ORDER OF DECEMBER 21, 1942

At a stated term, to wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of December in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on for hearing on demurrers of defendants Edward F. Zap and Lloyd V. Scott; hearing on motions of said defendants for a Bill of Particulars, and for plea of each of said defendants; George R. Maury, Esq., Special Assistant to the Attorney General, appearing for the Government; Morris Lavine, Esq., appearing as counsel for defendant Zap, who is present in Court on bond; Harry G. Balter, Esq., appearing as counsel for the defendant Scott, the defendant Scott being absent; it is ordered that this matter be and it hereby is continued to January 12, 1943, at 10 A. M. for hearing demurrers, motions, and for plea of each of the said defendants. [32]

MINUTE ORDER OF JANUARY 12, 1943

At a stated term, to-wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 12th day of January in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause coming on for hearing on motion of defendants for return of papers, files and documents pursuant to notice filed by defendant Zap December 29, 1942; hearing on demurrer of defendant Zap, and hearing on motion of defendant Zap for Bill of Particulars, and hearing on demurrer of defendant Scott, hearing on motion of defendant Scott for a Bill of Particulars, and for plea of said defendants; Walter S. Binns, Esq., and Harold F. Collins, Esq., appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for defendant Zap; Harry G. Balter, Esq., appearing as counsel for defendant Scott; A. H. Bargion, Court Reporter, being present and reporting the proceedings; the defendant Lloyd V. Scott being present; defendant Edward F. Zap being absent.

Attorney Lavine files waiver of appearance of defendant Zap and doctor's certificate of illness of defendant Zap; Attorney Lavine makes a statement re motion for return of papers; Attorney Collins makes a statement. The Court holds it has no jurisdiction in the matter. Exception noted.

Attorney Lavine presents demurrer; demurrer is overruled and exception noted.

Attorney Lavine presents motion for Bill of Particulars for defendant Zap, which is denied by the Court and exception noted.

Attorney Balter presents demurrer of defendant Scott and his motion for Bill of Particulars. Attorney Collins makes statement in reply. The Court

overrules the demurrer and denies motion for Bill of Particulars and exception noted. [33]

Defendant Lloyd V. Scott waives the reading of the Indictment and enters plea of not guilty; it is ordered that this cause be, and it hereby is, continued to April 6, 1943, for plea of defendant Zap, pursuant to stipulation of counsel, and it is further ordered that this cause be, and it hereby is, set for trial for April 6, 1943, at 10 A. M. [34]

MINUTE ORDER OF MARCH 15, 1943

At a stated term, to-wit: The February Term A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 15th day of March in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause coming on for hearing on motion of defendant Zap to suppress evidence and for return of documents seized, and other matters on calendar; Geo. Maury, Esq. Special Attorney, appearing for the Government; Morris Lavine, Esq., appearing as counsel for defendant Zap; H. G. Balter, Esq., appearing for the defendant Scott; Samuel Goldstein, Court Reporter, being present and reporting the proceedings.

Attorney Lavine asks to present oral testimony in connection with hearing on motion of defendant Zap to suppress evidence and for return of documents seized, which is denied by the Court and an exception noted. It is ordered that said motion to suppress, etc. be, and it is submitted on affidavits to be filed 3 x 3.

Plea in abatement of defendant Zap is ordered submitted, together with demurrer to and motion of the Government to strike plea in abatement.

Motion of defendant Zap to inspect minutes of Grand Jury is denied and exception noted. [35].

(Printer's Note): Minute Order of March 24, 1943, is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 203 herein.

MINUTE ORDER OF APRIL 6, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 6th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for Jury trial of the defendants Lloyd Scott and Edward F. Zap; George R. Maury, Walter S. Binns, and Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; Morris Lavine, Esq., appearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; the defendants being present in Court.

Attorney Lavine states that the defendant Zap is not ready for trial, and presents affidavit to the Court. Attorney Maury makes a statement.

Both defendants now enter pleas of not guilty to all counts of the Indictment.

Murray B. Myerson, Special Agent for the Department of Justice, is called, sworn, and examined by Attorney Maury on the question before the Court for a continuance, etc., and is cross-examined by Attorney Lavine.

Attorney Lavine objects to the jurisdiction of the Court to try this cause and argues in support thereof. Attorney Balter makes a statement on behalf of defendant Scott, and requests that the Government be required to elect on which theory it will proceed, etc. Attorney Maury argues in opposition thereto.

Motions of defendants are denied, and an exception allowed each defendant—all out of the hearing of the Jury.

At 11:14 A. M. counsel stipulate that a Jury may be impaneled for [38] the trial of this cause from the panel of jurors in the Courtroom, with the understanding that if this particular panel is exhausted, recourse may be had to the balance of panel in Judge Yankwich's Courtroom for additional jurors to complete the Jury for the trial of this cause. The Clerk draws the names of the following twelve jurors, who take their seats in the Jury box:

1. Elisha J. Benton
2. Edward S. Wiget
3. Harry J. Raymond
4. Fred James Wilson
5. J. K. Boyer
6. Walter F. Lange
7. Philip J. Wolman
8. D. C. Wright
9. J. Henry Harris
10. Albert F. Bolz
11. Raymond Zens
12. Lenox C. Ray

Attorney Maury reads names of Government witnesses to prospective jurors in the box.

The Court examines the prospective jurors for cause.

At 11:44 A. M. the Court admonishes the prospective jurors that during the progress of this trial and the recesses therein, they are not to speak to anyone or permit anyone to speak to them about this cause, or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instructions of the Court, they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally sub-

mitted to them, and declares a recess for ten minutes.

Court reconvenes at 11:52 A. M.; all present as before, and the prospective jurors are examined further for cause by the Court.

At 12 o'clock noon the Court reminds the jurors of the admonition heretofore given, and declares a recess to 1:30 P. M.; Court reconvenes at 1:30 P. M.; all present as before, except Attorney Binns; and, on motion of Attorney Marry, Miss Arbuthnot is associated as counsel for the Government in this case.

The prospective jurors in the box are examined for cause by Attorney Lavine and by Attorney Balter. Attorney Binns appears and examines the jurors for cause, and the jurors in the box are passed for cause.

Albert F. Bolz is excused by defendants on peremptory challenge; [39] it is ordered that one more name be drawn, and the name of Charles H. Hahn is drawn; examined for cause by the Court and by Attorneys Lavine, Balter and Binns, and passed for cause.

D. C. Wright is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Jens B. Jensen is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Lenox C. Day is excused by the Government on peremptory challenge; it is ordered that one more name be drawn, and the name of Edwin L. Kirk is

drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

J. Henry Harris is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of James H. Knouse is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Walter F. Lange is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Harry F. Westrem is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Raymond Zens is excused by the Government on peremptory challenge; it is ordered that one more name be drawn, and the name of Glenn Helms is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Glenn Helms is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of S. Allen Greer is drawn; examined for cause by the Court and by Attorneys Lavine and Balter, and passed for cause.

Harry J. Raymond is excused by the Government on peremptory challenge; it is ordered that one more name be drawn, and the name of George F. Howell is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

S. Allen Greer is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Harry F. Burke is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause. [40]

Harry F. Westrum is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Charles J. Foley is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Charles J. Foley is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Julius Wohl is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Harry F. Burke is excused by the Government on peremptory challenge; it is ordered that one more name be drawn, and the name of M. E. Barnhill is drawn; examined by the Court for cause and excused for cause; it is ordered that one more name be drawn, and the name of John T. Watson is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

The Government waives its fifth peremptory challenge, and at 4:32 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess.

Court reconvenes at 4:48 P. M.; all present

as before, and it is ordered that counsel proceed.

Charles H. Hahn is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Edward B. Lovie is drawn; examined for cause by the Court, and by Attorneys Lavine and Balter, and passed for cause.

There being no further challenges, the jurors now in the box are accepted and sworn as the Jury for the trial of this cause, viz.:

1. Elisha J. Benton
2. Edward S. Wiget
3. Geo. F. Howell
4. Fred James Wilson
5. T. K. Boyer
6. Julius Wohl
7. Philip J. Wolman
8. Jens B. Jensen
9. James H. Knouse
10. Edward B. Lovie
11. John T. Watson
12. Edwin L. Kirk

At 5:05 P. M. it is ordered that two alternate jurors be drawn, and the names of John P. McCarty and Chandos E. Marks are drawn; both examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause, and there being no challenges, the said two alternate jurors are sworn. [41]

The Court reminds the 14 jurors of the admonition heretofore given, and declares a recess herein until 10 A. M. April 7, 1943. The balance of the panel, including the jurors from Judge Yankwich's Courtroom (none of whom were needed) are excused until notified. [42]

MINUTE ORDER OF APRIL 7, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 7th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial: George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government: Harry Graham Balter, Esq., appearing as counsel for the defendant Lloyd Scott; Morris Lavine, Esq., appearing as counsel for the defendant Edward F. Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendants and Jury are present, and it is so stipulated, and two alternate Jurymen being present.

Attorney Maury asks that juror Edward S. Wiget be excused and an alternate take his place, which request is resisted by counsel for defendants.

Murray B. Meyerson, heretofore sworn, makes a statement relative to juror Wiget being excused, and is cross-examined by Attorney Lavine.

James C. Stone is sworn and makes a statement

re juror Erward S. Wiget being excused, and is examined by Attorney Balter.

Juror Edward S. Wiget is excused from further jury service in this case, and the Clerk draws the name of alternate juror Chandos E. Marks, who takes seat No. 2 as a regular juror.

The Court reads the Indictment to the Jury.

At 11:24 A. M. the Court reminds the Jury of the admonition heretofore given, and declares a recess for ten minutes. Court reconvenes at 11:36 A. M.; all present as before, including defendants and Jury.

Attorney Lavine renews motion made before the trial commenced that the defendant Zap is denied due process of law guaranteed by the Fifth Amendment of the Constitution of the United States, upon all the grounds [43] therein set forth. The motion is denied and exception noted. Thereupon, Attorney Lavine requests a closed session of Court, in which request Attorney Balter joins. The Government resists the motion on the ground that the confidentialness of the records is no longer of any importance. Motion for closed session of Court is denied and an exception noted. Attorney Lavine moves for the exclusion of witnesses. Thereupon, all witnesses except defendants are ordered to leave the Courtroom, with the exception of Government Agent Murray F. Myerson and the wife of the defendant Zap, who are permitted to remain, and Lieutenant L. S. Minor may return to the Courtroom after he has testified.

At 11:44 A. M. Attorney Binns makes opening

statement to the Jury on behalf of the Government.

At 12:03 P. M. the Court reminds the Jury of the admonition heretofore given, and recesses herein to 1:30 P. M.

Court reconvenes at 1:30 P. M.; all present as before, including defendants and the Jury, and counsel so stipulate.

Attorney Lavine makes opening statement on behalf of defendant Zap to the Jury.

At 2:30 P. M. Attorney Balter makes opening statement to the Jury on behalf of defendant Scott.

Commander Glenn Albert Smith is called, sworn, and testifies for the Government.

At 4:16 P. M. the Court reminds the Jury of the admonition heretofore given, and declares a recess for ten minutes. Court reconvenes at 4:27 P. M.; all present as before, including defendants and the Jury, and counsel so stipulate.

Lieutenant Lucien Smith Minor is called, sworn, and testifies for the Government.

At 5:30 P. M. the Court reminds the Jury of the admonition heretofore given, and recesses in this cause to 1:00 P. M., April 8, 1943, and Court adjourns. [44]

MINUTE ORDER OF APRIL 8, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 8th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial at 1:05 P. M.; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government: Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; Morris Lavine, Esq., appearing as counsel for defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; the defendants are present, and all jurors are present except juror Chandos E. Marks, who is absent. Juror Marks appears at 1:07 P. M. and counsel stipulate that defendants and jury are present; it is ordered that trial proceed.

Wm. Henry McAvoy is called, sworn, and testifies for the Government.

Fred S. Eastman is called, sworn, and testifies for the Government.

James W. Dwinnell is called, sworn, and testifies for the Government.

At 3:40 P. M. the Court reminds the Jury of the admonition heretofore given, and declares a ten minute recess; Court reconvenes at 3:50 P. M.; all present as before; defendants and Jury are present, and counsel so stipulate.

James W. Dwinnell resumes the stand and testifies further.

Raymond C. Davis is called, sworn, and testifies for the Government.

Lieutenant Lucien Smith Minor, heretofore sworn, resumes the stand and testifies further on examination by Attorney Maury.

At 6:02 P. M. the Court reminds the Jury of the admonition heretofore given, and recesses herein until 1 P. M. April 9, 1943, and Court adjourns. [45]

MINUTE ORDER OF APRIL 9, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 9th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial at 1:03 P. M.; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; Harry Graham Balter, Esq., appearing as counsel for the defendant Lloyd Scott; Morris Lavine, Esq., appearing as counsel for the defendant Edward F. Zap; the said defendants being present

in Court, and 13 jurors being present, counsel so stipulating; it is ordered that trial proceed.

Lieutenant Lucien Smith Minor, heretofore sworn, resumes the stand and testifies further.

At 3:30 P. M. the Court reminds the Jury of the admonition heretofore given, and declares a ten minutes recess; Court reconvenes at 3:56 P. M.; all present as before; defendants and jurors being present, and so stipulated by counsel; it is ordered that trial proceed.

Witness Minor resumes the stand and testifies further.

Stuart Eldredge Weaver, Jr. is called, sworn, and testifies for the Government.

Henry C. Webb is called, sworn, and testifies for the Government.

At 5:45 P. M. the Court reminds the Jury of the admonition heretofore given, and recesses herein until Monday, April 12, 1943, and Court adjourns.

[46]

MINUTE ORDER OF APRIL 12, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 12th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial of the defendants Lloyd Scott and Edward F. Zap; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendants being present in Court.

Court convenes herein at 10:20 A. M.; all present as indicated, and 13 jurors being present; Morris Lavine, Esq., attorney for defendant Zap, is absent (being in Judge Holtzer's Court); at 10:44 A. M. Attorney Lavine appears, and all being present as before; defendants and Jurors being present, and it is so stipulated; the Court orders that trial proceed.

Lieutenant Lucien Smith Minor, heretofore sworn, resumes the stand and testifies further on cross-examination by Attorney Lavine and by Attorney Balter, and redirect examination by Attorney Binns.

Thomas C. Browne is called, sworn, and testifies for the Government.

At 12:05 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses to 2 P. M.

Court reconvenes at 2 P. M.; all present as before; defendants and jurors present, and counsel so stipulate; it is ordered that trial proceed.

Thomas C. Browne resumes the stand and testifies further.

At 5:15 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes at 5:23 P. M., all [47] present as before; defendants and jurors are present, and it is ordered that trial proceed.

Earl W. Hanley is called, sworn, and testifies for the Government.

Mrs. Leona Hanley is called, sworn, and testifies for the Government.

At 5:55 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein until 9 A. M. April 13, 1943, and Court adjourns.

[48]

MINUTE ORDER OF APRIL 13, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 13th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial of defendants Lloyd Scott and Edward F. Zap; George R. Maury, Walter S. Binns, and Miss Sadie B.

Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; Morris Lavine, Esq., appearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendants and Jury are present, and it is so stipulated by counsel; it is ordered that trial proceed.

Harold Edward Dale is called, sworn, and testifies for the Government.

Miss Ethel H. Boyle is called, sworn, and testifies for the Government.

At 11:03 A. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes herein at 11:26 A. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Frank Gorman Jeffers is called, sworn, and testifies for the Government.

Marion Simon Israel is called, sworn, and testifies for the Government.

Harold W. Curn is called, sworn, and testifies for the Government.

At 12:02 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein to 2 P. M.

Court reconvenes at 2 P. M; all present as before; defendants [49] and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Harold W. Curn resumes the stand and testifies further.

Harold Simon Israel is recalled and testifies further.

Vernon Owen Orr is called, sworn, and testifies for the Government.

Gordon Albert Hast is called, sworn, and testifies for the Government.

Leland E. Reed is called, sworn, and testifies for the Government.

Harry Champlin is called, sworn, and testifies for the Government.

At 4:52 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess.

Court reconvenes at 5:12 P. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Harry Champlin, resumes the stand and testifies further.

At 5:55 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein to 9 A. M. April 14, 1943, and Court adjourns. [50]

MINUTE ORDER OF APRIL 14, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles

on Wednesday the 14th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter and Morris Lavine, Esqs., appearing as counsel for the defendants Scott and Zap, respectively; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendants and 13 jurors being present; it is ordered that trial proceed.

Harry Champlin, heretofore sworn, resumes the stand and testifies further.

At 11 A. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes at 11:20 A. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Harry Champlin resumes the stand and testifies further.

Hilton Jack Byars is called, sworn, and testifies for the Government.

At 12 o'clock noon the Court reminds the jurors of the admonition heretofore given, and recesses to 1 P. M.

Court reconvenes at 1 P. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Witness Hilton Jack Byars resumes the stand and testifies further.

At 4:30 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess.

Court reconvenes at 4:46 P. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that [51] trial proceed.

Witness Hilton Jack Byars resumes the stand and testifies further.

At 6:15 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein until 9 A. M. April 15, 1943, and the Court instructs the jurors to appear at 9:30 A. M. [52]

MINUTE ORDER OF APRIL 15, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 15th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial of the defendants Lloyd Scott and Edward F. Zap; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; Morris Lavine, Esq., appearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; the defendants being present and the Jury being absent; it is ordered that counsel proceed.

Attorney Maury withdraws his motion to introduce Government's Exhibit No. 56 into evidence.

Defendant Zap, through Attorney Lavine, objects to the introduction of certain evidence, Government's Exhibit No. 55 for Identification, into evidence. Attorney Balter objects to the introduction into evidence of Government's Exhibit No. 55 for Identification. Attorney Maury argues in opposition thereto.

Attorney Balter moves for a directed verdict for defendant Scott on each and every count of the Indictment.

Government's Exhibit No. 33, in evidence, is withdrawn.

Attorney Maury moves to dismiss counts 1 to 6, inclusive, as to the defendant Scott, and it is so ordered.

The Government rests at 10:13 A.M.

Attorney Balter moves for directed verdict for

defendant Scott on counts 7 to 13, inclusive, and argues in support thereof.

Attorney Binns argues in opposition thereto. [53]

Attorney Balter argues further.

Attorney Lavine moves to compel the Government to elect upon which counts they will stand upon, and argues in support thereof.

Attorney Maury moves to dismiss counts 2 and 6 as to the defendant Zap alone, and counts 9 and 12 as to both defendants, and said motion is granted.

Attorney Lavine, in behalf of defendant Zap, moves that as to counts 1 and 3, 4 and 5, 7 and 8, and 10 and 11, the Government be compelled to elect on which it will go to trial against defendant Zap.

Attorney Maury argues in opposition. The motion is denied, and an exception noted for the defendant Zap.

Attorney Lavine moves to strike from the evidence portion of Government's Exhibit No. 30.

Attorney Maury argues in opposition thereto.

The motion is denied.

Defendant Zap, through Attorney Lavine, moves for directed verdict on each of the remaining counts left in the indictment, and argues in support thereof.

Attorney Binns argues in opposition.

The Court orders that conspiracy count 13 be, and it hereby is, dismissed as to both defendant.

The Court grants the motion of Attorney Balter for a directed verdict for defendant Scott on all remaining counts. The motion of Attorney Lavine for a directed verdict for the defendant Zap on the remaining counts is denied, and exception noted for the defendant Zap.

The case is now open against the defendant Zap only on counts 1, 3, 4, 5, 7, 8, 10 and 11.

At 11:15 A. M. Court recesses.

Attorney Balter and defendant Scott are discharged from the case.

Court reconvenes at 11:30 A. M.; Government counsel as before noted. Attorney Lavine, defendant Zap, and the jurors being present; it is ordered that trial proceed.

Miss Ethel H. Boyle is called, sworn, and testifies for the defendant Zap. [54]

Wallace Howe McLauchlan is called, sworn, and testifies for the defendant Zap.

At 12:05 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses to 2 P. M.

Court reconvenes at 2 P. M.; all present as before; defendant Zap and jurors being present; it is ordered that trial proceed as to defendant Zap.

Witness Wallace Howe McLauchlan, heretofore sworn, resumes the stand and testifies further.

George Jue is called, sworn, and testifies for defendant Zap.

David Kehsin Wang is called, sworn, and testifies for defendant Zap.

Dale Alden Lichty is called, sworn, and testifies for defendant Zap.

Miss Ethel H. Boyle is recalled and testifies further for defendant Zap.

Mrs. Estelle Zap (wife of defendant) is called, sworn, and testifies for defendant Zap.

Edward F. Zap, defendant, is called, sworn, and testifies in his own behalf.

At 4 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes at 4:17 P.M.; all present as before; defendant Zap and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Defendant Zap resumes the stand and testifies further.

It is ordered that the bond of the defendant Lloyd Scott be, and it hereby is exonerated.

At 5:35 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein until 10 A. M. April 16, 1943, and court adjourns. [55]

MINUTE ORDER OF APRIL 16, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 16th day of April in the year of our Lard one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial of the defendant Edward F. Zap on counts 1, 3, 4, 5, 7, 8, 10 and 11 only; George R. Maury, Esq., Walter S. Binns, Esq., and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Morris Lavine, Esq., ap-

pearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendant Zap and jurors being present and counsel so stipulate; it is ordered that trial proceed.

William L. Butler is called, sworn, and testifies for the defendant Zap.

Harry S. Magill is called, sworn, and testifies for the defendant Zap.

Edward F. Zap, heretofore sworn, resumes the stand and testifies further in his own behalf.

At 12 o'clock noon the Court reminds the jurors of the admonition heretofore given, and recesses to 1:30 P. M.; Court reconvenes at 1:30 P. M.; all present as before; defendant Zap and jurors are present; it is ordered that trial proceed.

Witness Wm. L. Butler resumes the stand and testifies further.

At 1:40 P. M. defendant Zap resumes the stand and testifies further.

At 4:30 P. M. the Court reminds the jurors of the admonition heretofore given and declares a recess; Court reconvenes at 4:48 P. M.; all present as before; defendant Zap and jurors are present, and it is ordered that trial proceed.

Defendant Zap resumes the stand and testifies on cross-examination [56] by Attorney Maury, and on redirect examination by Attorney Lavine.

The defendant Zap rests at 6:20 P. M.

Hilton Jack Byars, heretofore sworn, resumes the stand and testifies for the Government is rebuttal.

Murray B. Myerson, special agent, F.B.I., hereto-

fore sworn, is called in rebuttal and testifies on direct examination by Attorney Binns and on cross-examination by Attorney Lavine.

U. S. Exhibits Nos. 34 to 45 are admitted into evidence.

At 6:45 P. M. the Court reminds the jurors of the admonition heretofore given, and excuses the jurors to 9 A. M. April 19, 1943, and Court recesses in this cause until that time. [57]

MINUTE ORDER OF APRIL 19, 1943

At a stated term, to wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial as to the defendant Edward F. Zap only, on counts 1, 3, 4, 5, 7, 8, 10 and 11; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Morris Lavine, Esq., appearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendant Edward

F. Zap and 13 jurors being present, and counsel so stipulate; it is ordered that trial proceed.

Attorney Maury at 9:13 A. M. argues to the Jury on behalf of the Government.

Attorney Lavine at 9:58 A. M. argues to the Jury on behalf of defendant Zap.

At 11:25 A. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes at 11:42 A. M.; all present as before; defendant Zap and jurors are present, and counsel so stipulate; it is ordered that counsel proceed.

Attorney Binns argues to the Jury in closing for the Government.

At 12:20 P. M. the Court reminds the jurors of the admonition heretofore given and recesses herein until 2:15 P. M.

Court reconvenes at 2:18 P. M.; all present as before; defendant Zap and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Juror McCarty is excused, and the Court instructs the Jury on the law of the case.

Attorney Lavine notes exceptions to certain instructions.

At 3:22 P. M. Bailiff Albert Kottner is sworn as the officer to [58] care for the Jury and the Jury retires for deliberation upon its verdict.

Court reconvenes at 4:35 P. M.; all present as before except the Jury and Attorney Binns, and it appearing that the Jury desires a copy of the Indictment and the instructions of the Court to the Jury sent up to them, and Attorney Binns later appearing, the Jury returns into Court at 4:50

P. M.; counsel stipulate that the Jury is present; the Court states it does not feel it proper to submit the Indictment to the Jury in view of the fact that some counts have been dismissed, and with regard to the instructions to the Jury the Court states it would take the reporter two hours or more to transcribe the instructions and would be willing to re-read any points of the instructions requested; and thereupon the Court reads from indictment and re-reads Jury instructions.

At 5:21 P. M. the Jury retires for further deliberation.

At 6 P. M. the Jury is ordered to dinner, with instructions to return at 7:30 P. M. The Jury goes to dinner at 6:30 P. M. at the Hayward Hotel and returns at 8:20 P. M. and retires for further deliberation.

At 11:12 P. M. Court reconvenes; all present as before; defendant Zap and Jury are present, and counsel so stipulate; Court Reporter Marquardt being present.

The Jury presents two verdicts, which are ordered read and filed, said verdicts being as follows:

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the jury in the above entitled case, find the defendant, Edward F. Zap, guilty as charged in the 1st count of the Indictment;

Not guilty as charged in the 3rd count of the Indictment;

Guilty as charged in the 4th count of the Indictment;

Guilty as charged in the 5th count of the Indictment; [59]

Not Guilty as charged in the 7th count of the Indictment;

Not Guilty as charged in the 8th count of the Indictment;

Not Guilty as charged in the 10th count of the Indictment;

Not Guilty as charged in the 11th count of the Indictment;

Dated: Los Angeles, California, April 19th, 1943.

EDWIN L. KIRK
Foreman of the Jury

Filed Apr. 19, 1943.
Edmund L. Smith, Clerk,
By Francis E. Cross, Deputy Clerk.

[Title of District Court and Cause.]

DIRECTED VERDICT OF THE JURY AS TO SCOTT

We, the jury in the above entitled case, find the defendant Lloyd Scott not guilty on each of the thirteen counts of the Indictment.

Dated: Los Angeles, Calif., April 19th, 1943.

EDWIN L. KIRK
Foreman of the Jury

Filed Apr. 19, 1943.
Edmund L. Smith, Clerk,
By Francis E. Cross, Deputy Clerk.

At 11:16 P. M. the jurors are excused until notified.

Attorney Lavine states he will make motion for new trial and other motions, and it is ordered that this cause be, and it hereby is, continued to Friday, April 23, 1943, at 10 A. M. for sentence, and defendant is ordered released on present bond meanwhile. [60]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the jury in the above entitled case, find the defendant, Edward F. Zap:

Guilty as charged in the 1st count of the Indictment;

Not Guilty as charged in the 3rd count of the Indictment;

Guilty as charged in the 4th count of the Indictment;

Guilty as charged in the 5th count of the Indictment;

Not Guilty as charged in the 7th count of the Indictment;

Not Guilty as charged in the 8th count of the Indictment;

Not Guilty as charged in the 10th count of the Indictment; and

Not Guilty as charged in the 11th count of the Indictment.

Dated: Los Angeles, California, April 19th, 1943.

EDWIN L. KIRK
Foreman of the Jury

[Endorsed]: Filed Apr. 19, 1943. [61]

MINUTE ORDER OF APRIL 22, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 22nd day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming before the Court at the hour of 10:15 o'clock A. M. for sentence of defendant, Edward F. Zap, on the first, fourth, and fifth counts of the Indictment; George R. Maury, Esq., Walter S. Binns, Esq., and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing as counsel for the Government; the defendant, Edward F. Zap, being present in Court on bond with his attorney, Morris Lavine, Esq., and James R. Marquardt, Court Reporter, being present and reporting the proceedings; and the Court having previously advanced the date for sentence of said de-

fendant from Friday, April 23, 1943, to Thursday, April 22, 1943; Attorney Morris Lavine, Esq., now moves for a new trial and in arrest of judgment, and argues in support thereof and files affidavit of Edward F. Zap; and Attorney George R. Maury, Esq., having argued in opposition to said motions, and Attorney Morris Lavine, Esq., having argued further in reply, it is now by the Court ordered that the said Motions for a new trial and in arrest of judgment be, and the same hereby are, denied, and that an exception be allowed to the defendant, Edward F. Zap; and the defendant Edward F. Zap having thereupon been asked if he has anything to show why judgment should not now be pronounced against him, and Morris Lavine, Esq., having made a statement relative to sentence, the defendant Edward F. Zap having made a statement in mitigation of sentence, and George R. Maury having made a statement, it is now the judgment of the Court that the defendant, Edward F. Zap, on count one of the Indictment, be fined the sum of $2,000.00 and be imprisoned in a county jail to be designated by the Attorney General for nine months; [62] on count four that said defendant be fined the sum of $2,000.00, and be imprisoned in a county jail to be designated by the Attorney General for nine months; and on count five that said defendant be fined the sum of $2,000.00 and be imprisoned in a county jail to be designated by the Attorney General for nine months, the county jail sentence to begin and to run concurrently and not consecu-

tively; and it is further ordered by the Court that should an appeal be taken the defendant is required to pay to the Clerk of the District Court, in escrow, one-half of the $6,000.00 fine, or the sum of $3,000.00, in cash, under Rule 5 of the Rules of Practice and Procedure in Criminal cases, as amended; and Morris Lavine, Esq., having thereupon requested the Court to suspend the jail portion of the sentence on condition that the fine is paid (to which there is no ruling), and Attorney George R. Maury, Esq., having informed the Court that if an appeal is prosecuted with diligence that an appeal bond in the sum of $5,000.00 would be satisfactory to the Government suspending the execution of the jail sentence only pending the outcome of the appeal, provided, however, that one-half of the $6,000.00 fine, or $3,000.00, is placed in escrow meanwhile, as aforesaid, it is by the Court ordered, that bond on appeal be fixed in the sum of $5,000.00, guaranteeing his appearance for execution of the jail sentence if the judgment of the District Court is affirmed on appeal; that as a condition precedent to said appeal the defendant, Edward F. Zap, is required to pay to the Clerk of the Court, in escrow, one-half of the $6,000.00 fine, or $3,000.00, in cash, as aforesaid, but that it will not be necessary for the appeal bond to guarantee the payment of the remaining $3,000.00 imposed as a fine in case the judgment of the District Court is affirmed; and the Bonding Company having entered into a stipulation in writing (which is filed this date) that the defendant could have a five day

stay of execution of the jail sentence only, and that the present bond should remain in effect meanwhile, it is by the Court ordered that said defendant have a stay of execution on the prison sentence to April 27, 1943, at 4:30 P. M., and the Court declares a recess at 11:50 o'clock A. M.; and thereupon, at the hour of 1:16 o'clock P. M., the Court having reconvened and all being present as before, [63] except Miss Sadie B. Arbuthnot and the Court Reporter, who are both absent, Attorney Lavine moves the Court to suspend the execution of the jail sentence, allowing the fine to remain in effect in event an appeal is taken, or to place the defendant on probation for nine months or for a longer period of time; and Attorney Maury having informed the Court that the Government did not wish to be placed in the position of bargaining with the defendant, that the sentence was heretofore pronounced at the morning session of the Court, that the Government did not wish to place the defendant in a position where the jail sentence is contingent upon his not paying the fine, and that before the Government could consent to a proposed amendment of the sentence, as Attorney Lavine proposes it, as aforesaid, that it would be necessary for him to get the consent of his superiors in the Department of Justice in Washington, no ruling is made on the modification of sentence at this time; and it appearing to the Court that the Government would consent to a further

stay of execution of the prison sentence only, provided the bonding company would consent thereto, in writing, it is by the Court ordered that a further stay of execution of the prison sentence of nine months only be granted to defendant, Edward F. Zap, to June 2, 1943, provided that the bonding company will consent in writing that the present bond of Edward F. Zap for $7,500.00 remain in force until that time, which consent was filed under date of April 22, 1943, continuing the present bond of Edward F. Zap in force until June 2, 1943, at 4:30 P. M.

The judgment and commitment, as signed by the Court, is as follows, to-wit:

[Title of District Court and Cause.]

JUDGMENT AND COMMITMENT
ON COUNTS 1, 4 AND 5

On this 22nd day of April, 1943, came the United States Attorney, and the defendant Edward F. Zap appearing in proper person, and with his attorney, Morris Lavine, and

The defendant having been convicted on verdict of the jury of the [64] offense charged in the indictment in the above-entitled cause, to wit: On or about September 23rd, 1942, at Los Angeles, Calif., knowingly, wilfully and feloniously making and presenting for payment to an officer in the Naval Service of USA a false claim; On or about October 16, 1942, at

Los Angeles, Calif., knowingly, etc., making and presenting for payment to Disbursing Officer, Bureau of Supplies, and Accounts, U. S. Navy, San Diego, a false claim, etc., and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the County Jail type to be designated by the Attorney General or his authorized representative for the period of nine months on each of the first, fourth, and fifth counts of the indictment, sentence to begin and to run concurrently, and not consecutively; and in addition thereto, paying unto the United States of America a fine in the sum of two thousand dollars on each of said three counts, making a total fine of six thousand dollars.

It is further ordered that a stay of execution on the jail sentence be had until June 2, 1943 at 10:00 o'clock A. M., provided the consent of the bonding company is obtained thereto in writing.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other

qualified officer and that the same shall serve as the commitment herein.

J. F. T. O'CONNOR
United States District Judge

Filed Apr. 22, 1943.
Edmund L. Smith, Clerk,
By Francis E. Cross, Deputy Clerk.

Note: On April 22nd, 1943, the bonding company having consented thereto in writing, the court entered a minute order that defendant Zap have a stay of execution on the jail sentence only to April 27th, 1943, at 4:30 P. M. [65]

District Court of the United States
Southern District of Calif.
Central Division

No. 15,728

Criminal Indictment in thirteen counts for violation of U. S. C., Title 18, Secs. 80 and 83

UNITED STATES

v.

EDWARD F. ZAP

JUDGMENT AND COMMITMENT
ON COUNTS 1, 4 AND 5

On this 22nd day of April, 1943, came the United States Attorney, and the defendant Edward F. Zap

appearing in proper person, and with his attorney, Maurice Lavine, and

The defendant having been convicted on verdict of the jury of the offense charged in the indictment in the above-entitled cause, to wit: On or about September 23rd, 1942, at Los Angeles, Calif., knowingly, wilfully and feloniously making and presenting for payment to an officer in the Naval Service of USA a false claim; On or about October 16, 1942, at Los Angeles, Calif., knowingly, etc., making and presenting for payment to Disbursing officer, Bureau of Supplies and Accounts, U.S. Navy, San Diego, a false claim, etc., and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the County Jail type to be designated by the Attorney General or his authorized representative for the period of nine months on each of the first, fourth, and fifth counts of the indictment, sentences to begin and to run concurrently, and not consecutively; and in addition thereto paying unto the United States of America a fine in the sum of two thousand dollars on each of said three counts, making a total fine of six thousand dollars.

It is further ordered that a stay of execution on

the jail sentence be had until June 2, 1943 at 10:00 o'clock A. M. provided the consent of the bonding company is obtained thereto in writing.

Note: On April 22nd, 1943, the bonding company having consented thereto in writing, the court entered a minute order that defendant Zap have a stay of execution on the jail sentence only to April 27th, 1943, at 4:30 p. m.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) J. F. T. O'CONNOR
United States District Judge

[Endorsed]: Filed this 22nd day of April, 1943. Edmund L. Smith, Clerk. By Francis E. Cross, Deputy Clerk. [66]

(Printer's Note): Motion for New Trial is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 216 herein.

(Printer's Note): Motion in Arrest of Judgment is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 219 herein.

(Printer's Note): Notice of Appeal is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 224 herein.

MINUTE ORDER OF MAY 26, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 26th day of May in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further proceedings: George Maury, Esq. and Miss Sadie Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Morris Lavine, Esq., appearing as counsel for the defendant, who is present: Marie G. Zellner, Court Reporter, being present and reporting the proceedings: Attorney Lavine makes a statement and moves for reduction of bail of Zap pending appeal from $5,000.00 to $3,000.00; Attorney Maury consents thereto, and the Court orders motion to reduce bonds granted.

[76]

MINUTE ORDER OF MAY 28, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 28th day of May in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming before the Court at the hour of 10:40 A. M. for further proceedings relative to the modification of sentence heretofore pronounced upon the defendant Edward F. Zap; George R. Maury, Esq., Walter S. Binns, Esq., James Harrington, Esq., and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; the defendant, Edward F. Zap, being present in Court with his attorney, Morris Lavine, Esq.; there being no court reporter present; Attorney Lavine makes a statement to the Court in behalf of the said defendant, and the defendant Edward F. Zap having made a statement to the Court, and it appearing that this case is now on appeal and that the Court has no jurisdiction to take further proceedings at this time, no ruling is made. [77]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Bond No. 824-0014

Know All Men by These Presents:

That we, Edward F. Zap as Principal, and the Northwest Casualty Company, a Washington corporation, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of Three Thousand ($3,000.00) Dollars, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 22nd day of April, 1943, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court in which the United States of America is Plaintiff, and Edward F. Zap was Defendant, judgment and sentence was made, given, rendered and entered against the said defendant in the above entitled action, whereas he was convicted as charged in the indictment:

Whereas, in said judgment and sentence, so made, given, rendered and entered against said Edward F. Zap, it was ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Jail Type, to be designated by the At-

torney General or his authorized representative for a period of nine months on each of counts one, four and five of the indictment, [78] said sentence to run concurrently; and to pay unto the United States of America a fine of Two Thousand Dollars ($2,000.00) on counts one, four and five of said indictment or a total of Six Thousand Dollars ($6,000.00).

Whereas, the said Edward F. Zap, has filed notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Edward F. Zap, has been admitted to bail pending the decision upon said appeal, in the sum of Three Thousand Dollars ($3,000.00).

Now therefore, the conditions of this obligation are such that if said Edward F. Zap shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said Edward F. Zap shall abide by and obey Court orders by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said Edward F. Zap shall surrender himself in execution of said judgment and sentence, if the said judgment and sentence is affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said Edward F. Zap will appear for trial in the District Court of the United States,

in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, if the said judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

This recognizance shall be deemed and construed to contain the "express agreement", summary judgment and execution thereon, mentioned in Rule 13 of the District Court.

EDWARD F. ZAP
Principal
10974½ Wilshire Blvd., W. Los Angeles
(Address)

NORTHWEST CASUALTY COMPANY, a Washington Corporation, [79]
By A. W. APPEL
Its Attorney-in-Fact
Surety

State of California,
County of Los Angeles—ss.

On this 28th day of May, A. D. 1943, before me, Marva Weede, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared A. W. Appel, Attorney-in-Fact of the Northwest Casualty Company, a Washington corporation, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowl-

edged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles, County of Los Angeles, the day and year first above written.

MARVA WEEDE

Notary Public in and for the County of Los Angeles, State of California.

Approved as to form.

JAMES E. HARRINGTON

Special Assistant to Attorney General

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

MORRIS LAVINE

Attorney for Defendant and Appellant

The foregoing bond is approved this 1st day of June, 1943.

J. F. T. O'CONNOR

United States District Judge

[80]

[Endorsed]: Filed Jun. 1, 1943. [81]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Morris Lavine,
620 Bartlett Bldg.,
Los Angeles, Calif.,
TR 3241
Attorney for Appellant.

No.

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

AFFIDAVIT FOR ENLARGEMENT OF TIME

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney for the appellant in the above-entitled case; that notice of appeal was duly and regularly filed in this case on April 26, 1943; that it is necessary to prepare a bill of exceptions in connection with this appeal; that the last day on which the bill of exceptions may be lodged and engrossed by the District Judge would be May 25, 1943, unless the time is further enlarged by the District Court at this time; that the trial judge, J. F. T. O'Conner, has left for Washington, D. C., and that

he continued other matters in the case because of his absence from the city, to June 2, 1943; that there are almost 2,000 pages of reporter's transcript, and that additional sections are being transcribed in regard to preliminary proceedings in the case, and that these have as yet not been transcribed by the court reporter and furnished to counsel;

That in order properly to prepare the bill of exceptions affiant believes that it will be necessary to have to and including July 15, 1943, to lodge the bill of exceptions. [82]

Wherefore, affiant prays that this Honorable Court allow additional time to and including July 15th within which to lodge the bill of exceptions and to and including July 30th, 1943, for the District Court to approve and engross the same.

Dated: May 5, 1943.

MORRIS LAVINE

Subscribed and sworn to before me this 7th day of May, 1943.

PAUL P. O'BRIEN
Clerk, U. S. District Court of Appeals
for the Ninth Circuit

Copy of the within affidavit received this 11th day of May, 1943.

JAMES E. HARRINGTON, et al.
Attorneys for Appellees

[Endorsed]: Filed May 21, 1943. [83]

[Title of Circuit Court of Appeals and Cause.]

ORDER ENLARGING TIME TO LODGE BILL OF EXCEPTIONS

It appearing that the record in the above-entitled case is almost 2,000 pages, and that additional sections are being transcribed in regard to preliminary proceedings which have not as yet been furnished to counsel for the appellant, and good cause appearing therefor,

It is ordered that the time within which appellant may lodge his bill of exceptions with the Clerk of the District Court of the Southern District of California be, and it hereby is extended to and including June 1, 1943, and to and including June 15, 1943, for the District Court to approve and engross the same.

Dated: May 11th, 1943.

PAUL J. McCORMICK
Judge

Copy of the within Order received this 11th day of May, 1943.

JAMES E. HARRINGTON, et al.
Attorneys for Appellees

[Endorsed]: Filed May 21, 1943. [84].

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court of the United States, Southern District of California, Central Division:

You will please prepare the following record in the above-entitled cause for the Ninth Circuit Court of Appeals:

1. Indictment;
2. Demurrer;
2A. All Court's minutes on all proceedings;
3. Minutes of the Court's ruling on the demurrer;
4. All Clerk's minutes of proceedings;
5. Rulings on motions to suppress evidence;
6. Rulings on motions to return evidence;
7. Motion in arrest of judgment;
8. Minutes of ruling on motion to suppress evidence;
9. Judgment;
10. Motion for new trial;
11. Minutes on ruling on motion for new trial;
12. Stipulation and order for transmission of exhibits;
13. All original exhibits to which a stipulation was entered; [86]
14. All extensions of time to settle and engross bill of exceptions;
15. Bill of exceptions;
16. This praecipe.

MORRIS LAVINE
Attorney for Defendant
and Appellant

[Endorsed]: Filed Dec. 20, 1943. [87]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 87 inclusive contain full, true and correct copies of: Indictment; Minute Orders Entered November 25, 1942, November 27, 1942, November 28, 1942, November 30, 1942, and December 7, 1942 respectively; Demurrer to Indictment; Minute Orders Entered December 18, 1942, December 21, 1942, January 12, 1943, March 15, 1943, March 24, 1943, April 6, 1943, April 7, 1943, April 8, 1943, April 9, 1943, April 12, 1943, April 13, 1943, April 14, 1943, April 15, 1943, April 16, 1943 and April 19, 1943 respectively; Verdict of the Jury; Minute Order Entered April 22, 1943; Judgment and Commitment; Motion for New Trial; Motion in Arrest of Judgment; Notice of Appeal; Minute Orders Entered May 26, 1943 and May 28, 1943 respectively; Bail Bond on Appeal; Affidavit for Enlargement of Time; Order Enlarging Time to Lodge Bill of Exceptions and Praecipe, which together with the Original Bill of Exceptions, Assignment of Errors and Original Exhibits constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $35.60, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12 day of February, 1944.

EDMUND L. SMITH,
Clerk.
By THEODORE HOCKE.
[Seal] Deputy Clerk.

At a stated term, to-wit: The October Term 1942, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the twenty-seventh day of May in the year of our Lord one thousand nine hundred and forty-three.

Present: Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding, Honorable Francis A. Garrecht, Circuit Judge, Honorable William Healy, Circuit Judge.

No. 10419

EDWARD F. ZAP,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER EXTENDING TIME TO FILE AND SETTLE BILL OF EXCEPTIONS AND TO FILE ASSIGNMENTS OF ERROR

Upon consideration of the motion of Mr. Morris Lavine, and of his affidavit in support thereof, and

of the consent of Messrs. James E. Harrington and George R. Maury, Special Attorneys, Department of Justice, counsel for appellee, and good cause therefor appearing,

It is ordered that the time within which appellant may lodge his proposed bill of exceptions in above cause in the District Court be, and hereby is extended to and including July 15, 1943; that the appellee may have to and including July 24, 1943 within which to propose any amendments thereto, and that the time within which the bill of exceptions may be settled and filed, and the assignments of error filed is extended to and including July 30, 1943.

[Endorsed]: Filed May 29, 1943.

At a stated term, to wit: The October Term 1942, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twelfth day of June in the year of our Lord one thousand nine hundred and forty-three.

Present: Honorable Francis A. Garrecht, Circuit Judge, Presiding, Honorable Clifton Mathews, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO FILE AND SETTLE BILL OF EXCEPTIONS, ETC.

Upon consideration of the motion of Mr. Morris Lavine, counsel for appellant, and supporting affidavit, and good cause therefor appearing, It Is Ordered that the time within which appellant may lodge his proposed bill of exceptions and file his assignments of error herein be, and hereby is extended to and including August 16, 1943; that the appellee may have to and including August 26, 1943, within which to propose any amendments thereto, and that the District Court may have to and including August 30, 1943 within which to settle and file the bill of exceptions.

[Endorsed]: Filed Jul. 13, 1943.

At a stated term, to wit: The October Term 1942, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the first day of October in the year of our Lord one thousand nine hundred and forty-three.

Present: Honorable Francis A. Garrecht, Circuit Judge, Presiding, Honorable William Denman, Circuit Judge, Honorable Clifton Mathews, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO FILE AND SETTLE BILL OF EXCEPTIONS

Upon consideration of the application of Mr. Morris Lavine, counsel for appellant, and his supporting affidavit, and good cause therefor appearing, It Is Ordered that the time within which the appellant may lodge his proposed bill of exceptions in this cause be, and hereby is extended to and including October 21, 1943; that the appellee may have to and including November 8, 1943, within which to propose any amendments thereto, and that the time within which the bill of exceptions may be settled and filed be, and hereby is extended to and including November 16, 1943.

[Endorsed]: Filed Oct. 2, 1943.

[Title of Circuit Court of Appeals and Cause.]

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That appellant's proposed bill of exceptions is due to be lodged in the United States District Court on October 21, 1943, with 15 days thereafter for the Government to propose amendments thereto, and five days thereafter for the Court to settle the same.

That the bill of exceptions is all typed and is in the process of being assembled, but that appellant's

assignments of error have not been completed: that the bill of exceptions runs well over 400 pages and the assembling of the same will require quite some time.

Wherefore, affiant prays that this Honorable Court extend the time in which to lodge the said bill of exceptions and file the assignments of error to and including October 25, 1943; that the Government may have 15 days thereafter to propose amendments and exceptions, and that the Court have five days thereafter to settle the bill of exceptions.

MORRIS LAVINE

Subscribed and sworn to before me this 21st day of October, 1943.

LUCILE TOWLES SUTHERLAND
Notary Public in and for said County and State

So ordered.

CURTIS D. WILBUR
CLIFTON MATHEWS
ALBERT LEE STEPHENS
United States Circuit Judges

[Endorsed]: Filed Oct. 22, 1943. Edmund L. Smith, Clerk. By Irwin Hames, Deputy Clerk.

[Endorsed]: Filed Oct. 21, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest, October 21, 1943.

PAUL P. O'BRIEN,
Clerk.

[Seal]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the Government and the appellant, through their respective counsel, that the refused instructions of the appellant may be filed October 26, 1943, as a part of appellant's bill of exceptions.

Dated: October 25, 1943.

GEORGE R. MAURY
Special Attorney
War Frauds Division
By GEORGE R. MAURY
Attorney for Appellee
MORRIS LAVINE
By MILTON B. SAFIER
Attorney for Appellant

So ordered Oct. 25, 1943.

ALBERT LEE STEPHENS
CLIFTON MATHEWS
CURTIS D. WILBUR
Circuit Judges

[Endorsed]: Filed Nov. 1, 1943. Edmund L. Smith, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Endorsed]: Order, etc. Filed Oct. 25, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest: November 1, 1943.

PAUL P. O'BRIEN
Clerk
By FRANK H. SCHMID
Deputy Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT FOR ENLARGEMENT OF TIME

United States of America,
Southern District of California,
Central Division—ss.

George R. Maury, being first duly sworn, deposes and says:

That he is the attorney for the United States charged with the duty of preparing the appellee's proposed amendments to the appellant's Bill of Exceptions. That heretofore and on the 25th day of October 1943 the appellant's proposed Bill of Exceptions was served upon appellee and lodged in the office of the Clerk of the United States District Court in and for the Southern District of California, Central Division.

That your affiant has diligently endeavored to complete the Government's proposed amendments thereto, and has since the 25th day of October 1943 devoted his time to nothing else. In order to completely present all of the evidence, it is necessary, from both the point of view of lawyer's time involved and the stenographic time involved that the appellee be granted more time in which to prepare and complete the Government's proposed amendments and exceptions thereto. That said Bill of Exceptions runs to over six hundred pages, and that, as your affiant is informed and believes, the proposed amendments thereto will exceed one hundred and fifty pages.

Wherefore, affiant prays that this Honorable Court extend the time in which the appellee may

lodge its proposed amendments and exceptions thereto to and until the 30th day of November 1943, and that the District Court have five days thereafter to settle the Bill of Exceptions.

GEORGE R. MAURY

Subscribed and sworn to before me this 8th day of November, 1943.

EDMUND L. SMITH
Clerk of the United States District Court for the Southern District of California
By IRWIN HAMES
Deputy

Service of a copy of the foregoing affidavit acknowledged this 8th day of November, 1943. The appellant consents to the within requested extension of time.

MORRIS LAVINE
Attorney for Appellant

It is so ordered; November 8, 1943.

CURTIS D. WILBUR
ALBERT LEE STEPHENS
Judges, United States Circuit Court of Appeals for the Ninth Circuit

[Endorsed]: Filed Nov. 12, 1943.

[Endorsed]: Filed Nov. 10, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest: Nov. 10, 1943.

PAUL P. O'BRIEN
[Seal] Clerk

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

Whereas, the Government's and the defendant's exhibits in evidence in the above entitled action, which are on file in the office of the Clerk of the United States District Court, Southern District of California, Central Division, are in many instances very difficult, and in some cases impossible, to reproduce either by typewriting or by printing, and, in many instances, are extremely long documents, which would be very expensive to typewrite and to print, and

Whereas, the exhibits contain matters, which both parties desire the Court to see in their original form, and

Whereas, some of said exhibits contain notations in the handwriting of various persons in the margins of the typewritten or printed documents, and erasures, which both parties believe should be certified directly to the United States Circuit Court of Appeals for the Ninth Circuit by the District Court for the purposes of this appeal, and

Whereas, there are over 100 photographs among said exhibits in evidence, and

Whereas, Government's Exhibits 34 to 45 in evidence, inclusive, consist of virtually the entire set of books of account, including journals, ledgers, payroll ledgers, check records, cash records, and several hundred cancelled checks, etc., which were kept as the books of account of the defendant's business, and

Whereas, both the appellant and appellee desire

to avoid the expense of copying and re-photographing all of these bodily into the Bill of Exceptions, and the expense of reproducing said photographs in the printing thereof.

Now, therefore,

It is hereby stipulated and agreed by and between the appellant, Edward F. Zap, and the appellee, United States of America, by and through their respective attorneys, subject, nevertheless, to the approval of the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

1. That each and all of the hereinafter mentioned and designated exhibits in evidence, which are herein referred to respectively by the numbers given them by the Clerk of said District Court at the time of the trial herein, may be deemed by reference to be incorporated in the Bill of Exceptions both generally and respectively where and wherever references are made to them by such numbers in the body and context of said Bill of Exceptions to the same effect and purport as though each and all of said exhibits were fully set forth, word for word, figure for figure, and picture for picture in said Bill of Exceptions;

2. That the District Court may, after passing upon appellee's proposed amendments thereto, sign and settle said Bill of Exceptions, and may include therein a copy of this stipulation in lieu of including therein, either in substance or in full, copies of each and all of the hereinafter designated exhibits in evi-

dence, and that thereupon, each of said exhibits shall be deemed to be included in said Bill of Exceptions to the same effect and purport as though each and all of said exhibits were fully set forth therein as aforesaid;

3. That the exhibits to be so included, which are hereby so designated by the appellant are as follows:

Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, FF, GG, HH, II, JJ, KK, LL, MM, NN, PP, QQ, RR, TT, UU, VV, WW, XX, YY, ZZ.

Government's Exhibits 1, 58.

4. That the exhibits to be so included which are hereby designated by the appellee are as follows:

Government's Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21, 23, 26, 27, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 51, 52, 53.

5. That the United States District Court in and for the Southern District of California may make an order that all of the foregoing designated exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and for the safekeeping, transportation, and return thereof, at the cost of the appellant, to be paid to the Clerk of said District Court upon demand;

6. This stipulation in no wise constitutes a waiver of any objections and exceptions to the introduction of any exhibits by the District Court.

Dated: November 10th, 1943.

JAMES E. HARRINGTON
Special Assistant to the Attorney General
GEORGE R. MAURY
Special Attorney
Attorneys for Appellee
MORRIS LAVINE
Attorney for Appellant

It is so ordered.

November 12th, 1943.

ALBERT LEE STEPHENS (Sig.)
Judge of the United States Circuit Court
of Appeals for the Ninth Circuit

[Endorsed]: Filed Nov. 12, 1943. Paul P. O'Brien, Clerk.

A true copy.

Attest: Nov. 18, 1943.

PAUL P. O'BRIEN
Clerk

MEMORANDUM OF POINTS AND AUTHORITIES

The Appellate Court will review evidence in a proper case only when evidence is contained in a Bill of Exceptions, or otherwise authenticated as having been used before the trial court.

Lee Won Jeong v. United States (C.C.A. 9), 145 F. 512;

Thompson v. United States (C.C.A. 9), 202 F. 401, 405.

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal."

Rule 4, Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases brought in the District Courts of the United States, etc.

Where the parties stipulated thereto and the District Judge so ordered, the inclusion of certain exhibits in the Bill of Exceptions by reference only, in order that they might be sent directly to the Appellate Court, was sufficient, and the Circuit Court of Appeals should have considered the issues before it on the Bill of Exceptions as containing all the evidence below, and dismissal for lack of it was erroneous.

Krauss Bros. Lumber Co. v. Mellon, etc., 276 U.S. 386, 48 S.Ct. 358.

[Endorsed]: Filed Nov. 18, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT FOR ENLARGEMENT OF TIME

United States of America,
Southern District of California,
Central Division—ss.

George R. Maury, being first duly sworn, deposes and says:

That he is the attorney for the United States charged with the duty of preparing the appellee's proposed amendments to the appellant's Bill of Exceptions. That heretofore and on the 25th day of October 1943 the appellant's proposed Bill of Exceptions was served upon appellee and lodged in the office of the Clerk of the United States District Court in and for the Southern District of California, Central Division.

That your affiant has diligently endeavored to complete the Government's proposed amendments thereto, and has since the 25th day of October 1943 devoted his time to nothing else. In order to completely present all of the evidence, it is necessary, from both the point of view of lawyer's time involved and the stenographic time involved that the appellee be granted more time in which to prepare and complete the Government's proposed amendments and exceptions thereto. That said Bill of Exceptions runs to over six hundred pages, and that, as your affiant is informed and believes, the proposed amendments thereto will exceed one hundred and fifty pages.

Wherefore, affiant prays that this Honorable Court extend the time in which the appellee may lodge its proposed amendments and exceptions thereto to and until the 30th day of November, 1943, and that the District Court have five days thereafter to settle the Bill of Exceptions.

GEORGE R. MAURY

Subscribed and sworn to before me this 8th day of November, 1943.

EDMUND L. SMITH
Clerk of the United States District Court
for the Southern District of California
By IRWIN HAMES
Deputy

Service of a copy of the foregoing affidavit acknowledged this 8th day of November, 1943. The appellant consents to the within requested extension of time.

MORRIS LAVINE
Attorney for Appellant

It is so ordered: November 8, 1943.

CURTIS D. WILBUR
ALBERT LEE STEPHENS (Sig.)
Judges, United States Circuit Court
of Appeals for the Ninth Circuit

[Endorsed]: Filed Nov. 10, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER ENLARGING TIME

Upon reading the affidavit of Morris Lavine, and good cause appearing therefor,

It is ordered that the time within which appellant's proposed bill of exceptions may be signed and settled be enlarged to and including December 20, 1943.

Dated: November 27, 1943.

ALBERT LEE STEPHENS
Judge

CURTIS D. WILBUR
Senior United States Circuit Judge

FRANCIS A. GARRECHT
United States Circuit Judge

[Endorsed]: Filed Dec. 3, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest: Dec. 3, 1943.

PAUL P. O'BRIEN
Clerk.

[Seal]

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT FOR ENLARGEMENT OF TIME

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney for the appellant herein; that the appellee has filed proposed corrections and amendments to the proposed bill of exceptions and that the date within which the same must be signed and settled is fixed for December 6, 1943.

That the proposed amendments of appellee consist of several typewritten pages; that these proposed amendments, if adopted, will require considerable time to prepare and type, and that it is physically impossible to have the same prepared and settled within the time now fixed.

Wherefore, affiant prays that the time within which appellant may have the proposed bill of exceptions signed and settled be enlarged to and including December 30, 1943.

MORRIS LAVINE

Subscribed and sworn to before me this 27 day of November, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT AND ORDER ENLARGING TIME

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney for the above named ap-

pellant; that the time within which to settle and engross the bill of exceptions has been fixed for December 20, 1943; that on December 13, 1943, a hearing was held before the Hon. J. F. T. O'Connor to settle the proposed Bill of Exceptions and amendments proposed thereto; that the government's proposed amendments constituted additions of or corrections involving more than 112 pages of typewriting; that affiant has had two stenographers working on same since that date and it may be physically impossible to complete the proposed corrections and matters within the time fixed by law; that other than such corrections the Bill of Exceptions is completed and ready for engrossing; that affiant, because of the Christmas holidays intervening, requests until and including December 29, 1943 within which to complete and have engrossed the Bill of Exceptions.

MORRIS LAVINE

Subscribed and sworn to before me this 19th day of December, 1943.

CHAS. W. FRICKE
Judge of the Superior Court

Upon reading the affidavit of Morris Lavine, and good cause appearing therefore, the time within which to engross and settle the Bill of Exceptions is enlarged to and including Dec. 29, 1943.

December 20, 1943.

ALBERT LEE STEPHENS
Circuit Judge
CURTIS D. WILBUR
Circuit Judge

[Endorsed]: Order, etc. Filed December 28, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest: December 28, 1943.
PAUL P. O'BRIEN
Clerk

[Title of District Court and Cause.]

BILL OF EXCEPTIONS LODGED

[Title of District Court and Cause.]

To James E. Harrington and George R. Maury, Special Assistants to the Attorney General:

Please take notice that the within proposed Bill of Exceptions will be brought on for settlement in the District Court of the United States, in and for the Southern District of California, Central Division, before the Honorable J. F. T. O'Connor, in his Court Room in the Federal Building, Los Angeles, California, on the 10th day of November, 1943, at ten o'clock A. M. on said date, or as soon thereafter as said matter can be heard.

Dated this 23d day of October, 1943.

MORRIS LAVINE
Attorney for Defendant
and Appellant

[Title of District Court and Cause.]

DEMURRER TO INDICTMENT

Comes now the defendant Edward F. Zap and demurs to the indictment upon the following grounds, to-wit:

I.

That the indictment and each count thereof does not state an offense against the laws of the United States.

II.

That the indictment and each count thereof fails to designate what crime or crimes have been committed and under what section of the code said crimes are alleged to have been committed, and therefore fails to apprize the accused of the nature and cause of the accusation.

III.

The indictment is duplicitous; it splits up one alleged offense into three alleged offenses in counts I, II and III; it splits up one alleged offense into three alleged offenses in counts IV, V and VI; it splits up one alleged offense into three alleged offense in counts VII, VIII and IX; it splits [1*] up one alleged offense into three alleged offenses in counts X, XI and XII, in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

IV.

The indictment is vague, indefinite and uncertain

*Page numbering appearing at foot of page of original certified Bill of Exceptions.

in that it fails to specify in count I thereof what contracts designated as NXS-4105 and 83142 consisted of, and fails to specify with any degree of certainty what portion of said contracts would be paid by a fixed sum and what portion would be paid on the cost plus basis.

V.

The indictment is vague, indefinite and uncertain in failing to set forth the alleged claim and in failing to set forth in what manner or means the claim purported to be for the conducting of wind tunnel tests by the University of Washington and how and in what manner said claims were knowingly false.

VI.

Count II of said indictment is vague, indefinite and uncertain in that it fails to set up the materiality of any fact alleged to have been falsified, concealed or covered up by trick, scheme and device, and fails to set up what bill was allegedly presented by the University of Washington for certain wind tunnel tests, or what bill was allegedly represented as having been presented by the University of [2] Washington.

Said count II is further vague, indefinite and uncertain in failing to set up the purported contract NXS 4105 and in failing to show that any claim was presented pursuant to said alleged false representations.

VII.

Count III of said indictment is vague, indefinite and uncertain in that it fails to show what alleged

false bill, receipt, voucher, roll, account, claim, certificate or affidavit was presented, and fails to show what statements, if any, in said false bill, receipt, voucher, roll, account, claim, certificate or affidavit contained fraudulent and fictitious statements.

Said count III further fails to specify what entries, if any, were apportioned and caused to be apportioned upon the books and records, or what books and records, if any, contained alleged false entries, and in what manner the said books and records falsely reflected or falsely represented that monies had been paid pursuant to contract NXs-4105 with the United States of America.

Said count fails to sperify what the entries were upon the said books and records which allegedly were false and which allegedly were not paid to the University of Washington, or to anyone else, in payment of said wind tunnel tests pursuant to contract NXs-4105, or any other contract. [3]

VIII.

Count IV of said indictment is vague, indefinite and uncertain in that it fails to sperify the terms of contract 83142, or in what manner said claim was false and fictitious under the terms thereof.

IX.

Count V of said indictment is vague, indefinite and uncertain in that it fails to set forth what material fact, if any, was falsified and concealed by trick, scheme and device, and fails to show that Hilton Byers was a person authorized to pass upon the said cost inspection.

X.

Count VI of said indictment is vague, indefinite and uncertain in that it fails to set up in what false bill, receipt, voucher, roll, account, claim, certificate or affidavit the defendant Edward F. Zap made alleged false and fictitious statements and entries, and fails to specify the terms of contract 83142.

XI.

Count VII of said indictment is vague, indefinite and uncertain in that it fails to specify the claim alleged to be false, and fails to specify the contents of contract 83142, and fails to specify in what manner a trip to Daggett, California, was made or by whom, or pursuant to what contract it was made for the purpose of making test flights. [4]

X.

Count VIII of said indictment is vague, indefinite and uncertain in that it fails to specify in what way defendant allegedly falsified, concealed and covered up by trick, scheme and device a material fact, and fails to specify the terms of contract 83412 or that said tests and designs were purportedly made under said contract.

XI.

Count IX of said indictment is vague, indefinite and uncertain in that it fails to specify the false bill, receipt, voucher, roll, account, claim, certificate and affidavit alleged to be false and fictitious, and fails to specify in what manner the said defendant did cause the said claim to be entered upon the

books and records of the said Edward F. Zap, and fails to specify the terms of said contract.

XII.

Count X of said indictment is vague, indefinite and uncertain in that it fails to specify the terms of contract 83142, and fails to specify in what private experiments the said "mock-ups" had been used by the defendant Edward F. Zap in place of the work of the United States Navy, and is a pure conclusion of the pleader.

XIII.

Count XI of the said indictment is vague, indefinite and uncertain in that it fails to specify exactly what part of said work was done for the United States Navy and exactly [5] what work was done on private experiments for the sum of $700.

XIV.

Count XII of said indictment is vague, indefinite and uncertain in that it fails to inform the defendant of the charge against him and fails to specify the alleged false bill, receipt, voucher, roll, account, claim, certificate and affidavit and to specify what statements contained therein are allegedly fraudulent and fictitious and fails to specify how or in what manner there was an apportionment upon the books of the said Edward F. Zap entries that were false and entries that were not false amounting to $1100 alleged to have been paid L. E. Reed, and fails to show in what way the said accounts were allegedly falsely reflected and represented upon said books.

That said count further fails to specify how or in what manner $700 of the money was expended for and on account of experiments for the account of Edward F. Zap, and fails to specify what experiments were being conducted for Edward F. Zap's own account.

XV.

Count XIII of said indictment is vague, indefinite and uncertain in that it fails to specify what receipts and vouchers were false and fictitious that were to be presented to the Naval Cost Accountants and what distributions, apportionments and allocations of expenses incurred by the said [6] Zap Company was false, and what portion of said accounts was on a fixed fee basis and what other portions were on a cost plus basis, and fails to specify which entries were false and which were true.

Said count is further vague, indefinite and uncertain in that it fails to inform the defendant of the charge against him and fails to specify the facts.

Said count further fails to specify what cost of labor performed by his employees was to be on the government account and what cost of labor was to be on his own account, and in what manner these charges were false and fictitious.

Said count further fails to specify what accounts or figures the said Lloyd Scott did certify to as correct and what charges of labor and expenses he certified to as correct which it is alleged incorrectly set forth allowable claims, and fails to specify what account or accounts the said Lloyd Scott did certify to.

Said count is further vague, indefinite and uncertain in that under its overt acts it fails to specify wherein the alleged claim for $25,440 was false and which part was true, and fails to specify the terms of contract NXs-4105.

Said count further fails to inform the defendant of the charge against him in connection with the second overt act which alleges that said Lloyd Scott falsely certified to the correctness of expenses incurred on a test trip to Daggett, California, and fails to specify wherein the said bill was [7] not a true and correct bill.

Wherefore, defendant prays that the demurrer to the indictment be sustained and that the indictment be quashed.

Dated: December 16, 1942.

MORRIS LAVINE
Attorney for Defendant

POINTS AND AUTHORITIES

Defendant is entitled to be informed of the nature and cause of the accusation against him.

United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588;

United States v. Hess, 124 U.S. 483, 31 L.Ed 516;

Foster v. United States, 253 Fed. 481;

Miller v. United States, 288 Fed. 817;

Boykin v. United States, 11 Fed.(2d) 484;

Sixth Amendment to United States Constitution.

A crime cannot be split up into parts. A prosecutor can carve but a single offense out of a transaction.

People v. Stephens, 79 Cal. 428, 432;
People v. Puppilo, 100 Cal. App. 559;
Braverman v. United States, 87 L.Ed. 83.

[Endorsed]: Filed December 16, 1942. [8]

[Title of District Court.]

No. 15728

United States of America

vs.

Edward F. Zap and Lloyd Scott

No. 15729

United States of America

vs.

Edward F. Zap

No. 15730

United States of America

vs.

Lloyd Scott

MINUTE ORDER

Judge Hollzer's Calendar, December 18, 1942

It appearing that in the above entitled cases the defendants have filed separately either demurrers or motions for bills of particulars, or both; it fur-

ther appearing that in support of such demurrers and motions for bills of particulars counsel for defendants have filed mere skeleton references to certain decisions; it further appearing that said demurrers and said motions for bills of particulars are set to be heard before this court on December 21, 1942, It Is Ordered:

That counsel for defendants serve and file, on or before December 28, 1942, briefs in support of the respective demurrers and motions for bills of particulars; that counsel for government have one week thereafter within which to serve and file answering briefs; that counsel for defendants [9] have four days thereafter within which to serve and file reply briefs.

It is further ordered that the hearing on said demurrers and motions for bill of particulars, be, when said matters are called on the calendar of this Court on December 21, 1942, continued to January 12, 1943, at 10 A. M.

Copies to counsel. [10]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR BILL OF PARTICULARS

To the Honorable United States Attorney for the Southern District of California, Central Division:

Please take notice that on Monday, December 21, 1942, at the hour of 10:00 A. M., or as soon there-

after as counsel can be heard, the defendant Edward F. Zap will petition the Honorable Harry A. Hollzer, Judge of the United States District Court, in the Federal Building at Temple and Spring streets, Los Angeles, California, for an order directing the United States Attorney to serve and file a bill of particulars in the above-entitled case, more particularly setting forth the following:

Count I

I.

The exact terms and provisions of contracts designated NXs-4105 and 83142, as well as the terms of any and all supplements to amendments of and or modifications of each of these contracts, written or oral, so that the defendant may [11] be able to determine the exact provisions of said contracts and the manner or means of payments by the United States Navy, and the sum or sums to be paid thereunder.

II.

The fixed sum or sums due for the work done pursuant to said contracts and the sum or sums due on the basis of cost plus a fixed fee.

III.

The time, the place and the circumstances under which said fixed fee was to be paid, and said cost plus fixed fee was to be paid; the time, the place and the circumstances of the experimental work to be done under said contracts.

IV.

The exact manner and method in which this defendant presented for payment *the* approval an alleged false claim, and the name of the officer to whom it is alleged the said false claim was presented.

V.

The exact nature of the wind tunnel tests by the University of Washington which it is alleged the defendant was to have conducted.

VI.

The exact and specific terms of the claim allegedly presented by the defendant Edward F. Zap. [12]

Count II

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

The exact trick, scheme and device and the exact false and fraudulent statement and representation allegedly made, and the exact bill presented in connection with contract NKs-4105; state in what manner the said representations were false; to state when and where and under what circumstances said falsity was known by this defendant.

Count III

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Set out the exact entries upon the books and records which it is alleged were false.

Set out when and where said records were made and entered and who made the entries therein.

Set forth the alleged false bill, receipt, voucher, roll, account, claim, certificate and affidavit: set forth wherein said items were false and fraudulent.

Count IV

I.

The defendant reiterates his request for a bill of [13] particulars in every respect as set up in Count I.

II.

Set forth the name of the disbursing officer of the Bureau of Supplies and Accounts.

Set forth when and where said William H. McAvoy was paid and for what items of expense he was paid.

Set forth in detail the claim under contract 83142 and what portion or portions thereof it is alleged were false.

Count V

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Set forth the exact alleged trick, scheme and device and the alleged material fact that was allegedly falsified and concealed.

Give the exact false and fraudulent statement and representation, and state wherein the same is false.

Give the exact duties of Hilton Byers.

Give the exact items for which William H. McAvoy was paid approximately $2,375.

Count VI

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

[14]

II.

Set forth the exact false bill, receipt, voucher, roll, account, claim, certificate and affidavit alleged to be false.

Set forth the false and fraudulent statement and entries alleged to be therein made and point out their falsity.

Give the exact manner, means and circumstances, and exact language used to induce William H. McAvoy to endorse a blank check.

Set forth the services that William H. McAvoy was to render as a test pilot pursuant to contract 83142, and the exact services which he did render and for which he received payment in the sum of $2,075.

Set forth the exact manner and means in which it is alleged that the costs of said contracts were to be determined and the exact manner and means in which they were to be submitted to the United States Navy.

Count VII

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

State who the disbursing officer of the United States Navy was to whom said, or any claim, was presented, the exact claim that was presented, and wherein it is alleged that it was false.

Set forth the exact terms and conditions, and any [15] modifications, oral or written, of contract 83142, and set forth the exact nature of the test flights that were to be made under said contract.

Count VIII

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify the exact trick, scheme and device allegedly used, the material fact allegedly concealed and falsified, the alleged false and fraudulent statement and representation, and wherein said statement and representation were fraudulent.

Set forth the exact terms of contract 83142 and any alterations or modifications, oral or written.

Count IX

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Set forth the exact false bill, receipt, voucher, roll, account, claim, certificate and affidavit alleged to be false and fraudulent.

Set forth what entries were purportedly reflected as having been incurred on a trip to Daggett, California; just what test was conducted pursuant to contract 83142, and what expenses were incurred in the sum of $600, and what expenses [16] were claimed in the sum of $1,260; wherein any entries were made which falsely represented to the naval cost inspector that the amounts therein expended were true, and wherein said representations were false.

Count X

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify who the disbursing officer of the Bureau of Supplies and Accounts was to whom a false claim was presented.

Specify whether there was a contract with J. E. Reed, and whether such contract did include the construction and fabrication of model airplane work known as "mock-ups"; specify what private experiments said alleged "mock-ups" were used for, and specify whether, pursuant to any contracts with the Government, the defendant was required to construct "mock-ups."

Count XI

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify wherein the defendant falsified and concealed any material fact: specify what material fact was falsified and concealed. [17]

Specify the nature of the trick, scheme and device alleged to have been used.

Specify what statements were made which it is claimed were false and fraudulent.

Specify the terms of contract 83142.

Specify whether L. E. Reed was to be paid any sums of money pursuant to a contract between the defendant and the United States Navy; specify what portion of said contract was performed; specify what portion of the work was covered by approximately $700; specify what private experiments it is claimed were carried on for $400.

Count XII

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify the false bill, receipt, voucher, roll, account, claim, certificate and affidavit; specify wherein said items were false, fraudulent and fictitious.

Specify the exact terms of any agreement by which $1100 was to be paid, or any sum was to be paid to L. E. Reed.

Specify all contracts, written or oral, by which the defendant Edward F. Zap was to make any "mock-ups" and what the nature of the "mock-ups" was that he was engaged to make.

Specify in what manner Edward F. Zap knew that the said books and records of Zap would be presented to the United [18] States Navy, and when they were to be submitted to the United States Navy, and to whom in the United States Navy they were to be submitted.

Specify what it is alleged that $700 was expended for, precisely, and when and where it was expended and the nature of the experiments which it is alleged were conducted pursuant to said expenditure.

Count XIII

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify when and where the said defendants conspired, combined, confederated and agreed.

Specify who, if any, were the "divers other persons to the grand jury unknown."

Specify what false and fictitious entries it is alleged were made upon the books and records of Edward F. Zap, and who made the said false entries upon said books and records.

Specify who made false distributions, apportionments and allocations of expenses upon said books

and records, and upon whose instructions said alleged entries were made.

Specify just what portion of fees was to be paid as fixed fees, and what portion was to be paid as cost plus fixed fees; and specify how much was to be paid as a fixed fee and how much was to be paid as cost plus. [19]

Specify what claims and vouchers were false and set them out verbatim as it is allegedly claimed they were paid to the United States Navy.

Specify what costs were for labor which allegedly was performed by the employees on projects which were for the personal account of Edward F. Zap, and what costs were for labor performed on projects for the United States Navy, and specify which items were true and which it is claimed were false and fictitious.

Specify just what the instructions were which it is claimed the defendant Edward F. Zap gave, and to whom he gave them, and when and where.

Specify what bookkeepers of said Zap Company were instructed to charge expenses incurred for projects which were being performed on Zap's personal account, and when and where and in what manner said bookkeepers were instructed, and the exact instructions which were given.

Specify on what days or dates said charges were entered and wherein they were false in accordance with said alleged instructions.

Specify when and where and in what manner Lloyd Scott did certify to the correctness of the

aforesaid alleged incorrect entries and charges for labor costs, and specify when and where and in what manner the said Lloyd Scott became aware of and knew of said alleged incorrect entries.

Set forth when and where and in what manner the said [20] Lloyd Scott received sums of money and from whom, and set forth the manner, circumstances, times and places of the receipt of said monies.

Set forth the exact claim or voucher in the amount of $25,440 for labor and specify what portion of said voucher it is claimed falsely presented said claim, and wherein said claim is allegedly false.

Set forth the manner in which Lloyd Scott falsely certified the bill for a test trip to Daggett, California, and the exact claim alleged to have been presented and by whom it was certified and to whom it was presented and by whom it was approved.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

Points and Authorities

A defendant in a criminal case is entitled to particularity of time, place, circumstances, etc.

Martin v. United States, 20 Fed.(2d) 785;
Dunlop v. United States, 165 U.S. 486, 41 L.Ed. 799;
Savage v. United States, 270 Fed. 14, 18;
Rosen v. United States, 40 L.Ed. 606.

[Endorsed]: Filed December 17, 1942. [21]

[Title of District Court and Cause.]

NOTICE OF MOTION

To Commander G. A. Smith and Ensign Minor of the United States Navy, and to United States District Attorney Leo Silverstein and Special Attorneys General Harrington and Binns:

Please take notice that on the 4th day of January, 1943, at the hour of 10 M., I shall move the District Court of the United States, in and for the Southern District of California, Central Division, the Honorable Harry Hollzer presiding, for an appropriate order for the return to Edward F. Zap of all papers, files, documents, records and pink slips which were taken from him by the United States Navy following the arrest of said Edward F. Zap.

Said motion will be based upon the records and files of this case and upon the letter of Commander G. A. Smith, U.S.N., to the Honorable Harry Hollzer, upon the affidavits of Edward F. Zap attached hereto, and upon the fact that such seizure and detention of the private papers, [22] documents, files, records and pink slips was and is without any lawful authority, and that any further detention of said property would be violative of the Fourth and Fifth Amendments to the Constitution of the United States and is not necessary nor lawful.

Dated: December 23, 1942.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

[Endorsed]: Filed December 29, 1942. [23]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, on oath deposes and says:

That he is the head of Edward F. Zap Aeronautical Engineers, located at 1005 Broxton Avenue, West Los Angeles, California; that he is under indictment in the above-numbered cases, and that said indictment is now pending in the District Court of the United States, in and for the Southern District of California, Central Division, the Honorable Harry Hollzer, presiding;

That Ensign Minor, Naval Cost Inspector, has in his possession certain files, records and documents, particularly C-4 and C-5 forms, certain naval forms and records, which were and are the property of your affiant, and that said Ensign Minor is holding said documents and records without any legal warrant or other lawful procedure; [105]

That your affiant needs these papers, records and documents returned to him for the necessary defense and protection of himself in the criminal case of United States of America vs. Edward F. Zap, Nos. 15728 and 15729, in the above-entitled court;

That affiant is informed and believes that said Ensign Minor will return said papers, records and documents to your affiant upon an order of this Honorable Court releasing the same.

Wherefore, affiant prays that this Honorable Court issue an order to show cause to the said Ensign Minor, directing him to show cause why he should not return the said papers, records and documents to your affiant, and to set a date, time and place for hearing on the same.

EDWARD F. ZAP

Subscribed and sworn to before me this 14th day of December, 1942.

D. MEYER

Notary Public in and for said County and State.

[Endorsed]: Filed December 29, 1942. [106]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, on oath deposes and says:

That he is the head of Edward F. Zap Aeronautical Engineers, located at 1005 Broxton Avenue, West Los Angeles, California; that he is under indictment in the above-numbered cases, and that said indictment is now pending in the District Court of the United States, in and for the Southern District of California, Central Division, the Honorable Harry Hollzer presiding;

That affiant's files and records in the said case which were located at the above address, contain contracts and correspondence relating to business, the patent files, and two pink slips designating his ownership to certain automobiles; that subsequent to his arrest, and while he was in the Los Angeles County Jail, affiant is informed and [107] believes that certain persons connected with the United States Navy, acting under orders of Commander G. A. Smith of the United States Navy, took eleven boxes of files, records and documents belonging to your affiant; that affiant is informed and believes that subsequent to the taking of these files, records and documents, Commander Smith sent the following letter to the Honorable Harry Hollzer, judge presiding, and that said letter was in turn forwarded to the attorney for the government and to the attorney for your affiant:

"Office of
INSPECTOR OF NAVAL AIRCRAFT
Douglas Aircraft Co., Inc.
Santa Monica, Calif.

December 7, 1942

"The Honorable Harry Holzer
Federal Judge for the Southern
District of California
Federal Building,
Los Angeles, Calif.

"In connection with the E. F. Zap case, this is to inform you that, in order to protect Gov-

ernment property and general correspondence files which were without reasonable protection in the office of E. F. Zap, 1005 Broxton Avenue, West Los Angeles, California, I removed the above material and it is now placed in a bombproof and fireproof vault where it can be properly protected and safeguarded. This is to inform you that upon order of the Court, any part of the material described above will be released to the Court. Please give at least two days advance notice in order that we may open up the boxes and get the files or drawings desired. They will then be surrendered to the Court.

"I also wish to inform you that upon advice I hold two pink slips for automobiles made out to E. F. Zap. The reason I have held them has been to safeguard Government property, and I was informed that E. F. Zap had claimed [108] depreciation on these automobiles, or at least one of them, as a charge against the Navy; hence felt that I was justified in holding them. However, if directed by the Court, I will release either or both of the pink slips, as we have from the start been very careful not to interfere with the civil rights of E. F. Zap or any member of his organization.

"Very truly yours,

"G. A. SMITH

Comdr. USN (Ret)"

That affiant has talked to Commander Smith, and affiant's attorney, Morris Lavine, 620 Bartlett Building, Los Angeles, California, has also talked to Commander Smith, who has stated that he took the files, records, documents, pink slips, etc., and put them in a bombproof and fireproof vault for the protection of all persons concerned, including your affiant; that it is perfectly agreeable with Commander Smith to return any and all files, papers, records, documents, pink slips, etc., so seized, to affiant upon an appropriate order of this Court;

That said papers, records, documents, files, pink slips, etc., were not seized pursuant to any court process or other legal procedure, either military or civilian, and were taken solely for the protection and preservation of said records;

That your affiant needs these papers, records, documents, files, pink slips, etc., and therefore prays for an order of this Honorable Court requiring said Commander Smith to turn over to your affiant any and all papers, [109] records, documents, files and pink slips, etc., which were so taken.

EDWARD F. ZAP

Subscribed and sworn to before me this 14th day of December, 1942.

D. MEYER

Notary Public in and for said County and State.

[Endorsed]: Filed December 29, 1942. [110]

[Title of District Court and Cause.]

NOTICE OF MOTION

To George R. Maury, F. P. Harrington and Walter S. Binns, Special United States Attorneys, War Frauds Division, United States Attorney's Office:

You will please take notice, that upon the verified petition of Edward F. Zap, petitioner, duly verified this 4th day of March, 1943, upon the indictments found against the defendant, and upon all the proceedings had heretofore herein, and upon such affidavits and testimony as are filed and which may hereafter be presented on the hearing of this cause, a motion will be made in the courtroom of Judge Leon Yankwich, in the Federal Building, at Los Angeles, California, on March 8, 1943, at the opening of court on that day, or as soon thereafter as counsel can be heard, for the following relief:

1. That all papers, records, documents and files, and all other property seized by the Government from the apartments of Edward F. Zap, numbers 6 and 12, at 10976 [24] Wilshire Boulevard, West Los Angeles, California, be returned to the petitioner;

2. That all papers, records, documents and files, and all other property seized by the Government from the offices of Edward F. Zap Aeronautical Engineers, without a search warrant, be returned to the petitioner;

3. That any and all of the aforesaid property so seized be suppressed and that the United States

Attorney be restrained from using any of the documents or other papers aforesaid upon the trial of this action, or any information directly or indirectly obtained therefrom;

4. That all of said property aforesaid so unlawfully seized be returned to the petitioner;

5. For such other and further relief as to the Court may seem just and proper.

Dated: March 4, 1943.

MORRIS LAVINE
Attorney for Petitioner
Edward F. Zap

Received copy of the within this 5th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 5, 1943. [25]

[Title of District Court and Cause.]

MOTION TO SUPPRESS AND RETURN EVIDENCE ILLEGALLY SEIZED AND IN VIOLATION OF THE U. S. CONSTITUTION

Comes now Edward F. Zap, the defendant herein, residing at 10976 Wilshire Boulevard, West Los Angeles, California, and with places of business at 1005 Broxton Avenue and 1795 Westwood Boulevard, West Los Angeles, California, and states and alleges as follows:

I.

That defendant was accused by Indictment 15728 in the District Court of the United States, in and for the Southern District of California, Central Division, of violation of certain untitled sections of the Federal Code, and by Indictment 15729 in said court of violation of Title 18, Section 19, U.S.C.A., said indictments being filed November 25, 1942.

That defendant reserved the time for filing the plea of not guilty, and the Government and the defendant stipulated that same may be filed on the date set for trial.

II.

That during the month of October, 1942, defendant was [26] residing at the Westshire Apartments, 10976 Wilshire Boulevard, West Los Angeles, California, apartments 6 and 12, and that during the month of October he and his wife were out of the city; that he is informed and believes, and upon such information and belief alleges that while he was away agents of the Federal Bureau of Investigation came to the aforesaid two apartments where defendant and his wife were living, and at that time and place these agents searched the apartments of defendant, to-wit, apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, California, without a search warrant; that they accosted the manager of said apartment house and said manager asked the agents if they had a search warrant; that one of the agents replied that they did not, but that it was not necessary, that it was government busi-

ness; that thereafter said agents for the Federal Bureau of Investigation, and another agent who had come with them, without any warrant, searched the apartments; they went through the desk in the living room, the closet in the bedroom and a chest of drawers, and the hall closet; they looked in the large clothes closet in the living room and found some boxes on the floor which they went through; in one of those boxes affiant is informed and believes, and upon such information and belief alleges, they found some checks which they said was what they were looking for; they then took the checks out and told the apartment house manager they were going to have them photostated and would have them [27] back the next day; that they brought the checks back the next day.

That they did not at any time have a search warrant on these visits, and all they told the said manager of the apartment house was that it was Federal business and not to tell anybody.

The agent who took certain checks left slips of paper exactly where he returned the checks.

That the following Saturday these two men came back, with another man, and brought a search warrant, and removed the checks and papers which had been taken and photostated before. That said second search was based on information gained at the first and illegal search, and was therefore void.

III.

That the said search warrant which the Federal officers had was in itself void for the reason that

it was based upon information and belief of Harry Champlin and not upon any probable cause; that the affidavit in support of the said search warrant was in itself insufficient in that it was based upon hearsay, information and belief, and upon conclusions of Harry Champlin, and did not specify the thing or things sought to be seized with any particularity.

IV.

That certain papers, records, documents and files, located at the office of Edward F. Zap at 1005 Broxton Avenue, [28] West Los Angeles, California, were also removed without a search warrant or any legal authority, and said search and seizure of said office was unlawful under the Fourth and Fifth Amendments to the Constitution of the United States.

V.

That the said checks and check stubs so seized without a search warrant from 10976 Wilshire Boulevard, West Los Angeles, and the papers, records, documents and files so seized from 1005 Broxton Avenue, West Los Angeles, were illegally seized.

VI.

That the said subsequent search warrants, based on information gathered in the illegal search and seizure and photostating of said documents were and are illegal.

VII.

That the said search warrants are further illegal in that they are too vague, indefinite and uncertain

in describing the property about to be seized, and the affidavit on which they are based is too vague, indefinite and uncertain.

VIII.

That the said agents had no legal or other authority to make the search and seizure in the first investigation upon which they later based their search warrants of October 31, 1941; that the said agents had no right to enter the premises at 10976 Wilshire Boulevard and 1005 Broxton Avenue, West Los Angeles, California, and take the said checks, [29] check stubs, papers, records, documents and files, and said seizure was and is in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and defendant asserts that his rights were invaded in said seizure of said personal papers and documents, and he prays for their return and that the evidence, if it is intended to be used against him, so obtained in violation of said Fourth and Fifth Amendments, and following an unlawful search and seizure, be suppressed, as his rights under said Fourth and Fifth Amendments have been greatly violated; and defendant respectfully prays for the following relief:

1. That all of such evidence be excluded upon the trial of this action, and that this Honorable Court now make its order of suppression;

2. That all of the property so unlawfully seized and photostated without a search warrant in the first instance, and based upon search warrants in the second instance which were subsequent to this

illegal search and seizure, be returned to this defendant; [30]

3. That all of the property so unlawfully seized from his said offices without a lawful search warrant be returned to him.

EDWARD F. ZAP
Petitioner

MORRIS LAVINE
Attorney for Petitioner

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn on oath deposes and says:

That he is the petitioner herein; that he has read and knows the contents of the foregoing petition and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDWARD F. ZAP

Subscribed and sworn to before me this 4th day of March, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State.

Received copy of the within this 5th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 5, 1943. [31]

Points and Authorities

Garske v. United States, 1 Fed.(2d) 620;
United States v. Mitchell, 274 Fed. 128;
Weeks v. United States, 232 U.S. 383;
Silverthorne Lumber Co. v. United States, 251 U.S. 385;
Boyd v. United States, 269 U.S. 20, 70 L.Ed. 145;
Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145;
Byars v. United States, 273 U.S. 28, 71 L.Ed. 520. [32]

[Title of District Court and Cause.]

NOTICE OF MOTION

To Special Assistant to the Attorney General, James E. Harrington, Special Attorneys Walter S. Binns and George R. Maury:

Please take notice that on Monday, March 15, 1943, at the opening of court on that day, or as soon thereafter as counsel can be heard, the defendant, through his counsel, Morris Lavine, will move for an inspection of the minutes of the United States Grand Jury and for an inspection of all exhibits and records pertaining to the return of indictments Nos. 15728, 15729 and 15730, United States of America v. Edward F. Zap and Lloyd V. Scott, and for an order enabling the defendants to ascertain whether the said indictments were returned upon testimony secured by unlawful search and seizure in violation of the Fourth and Fifth

Amendments to the Constitution of the United States.

Said motion will be based upon all the records and files in the case and upon the affidavit of Edward F. Zap, and upon any testimony to be produced orally at said time and place.

Dated: March 9, 1943. [33]

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

Authorities

United States v. Farrington, 5 Fed. Rep. 343.

Received copy of the within Notice of Motion this 10th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Government

[Endorsed]: Filed March 10, 1943. [34]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS AND RETURN EVIDENCE ILLEGALLY SEIZED AND IN VIOLATION OF THE U. S. CONSTITUTION

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled

case; that he resides and did reside during the year 1942, and particularly during the months of October and November, 1942, at 10976 Wilshire Boulevard, Apartments 6 and 12, West Los Angeles, California, and that he maintained a business at 1005 Broxton Avenue, West Los Angeles, California:

That on the 18th day of October, 1942, affiant left the city of Los Angeles with his wife;

That affiant and his wife were the only two persons who reside or resided in said apartments 6 and 12 at 10976 Wilshire Boulevard, and that they were the only persons lawfully entitled to have in their possession any of the property or properties in said apartments; that when affiant and his wife left the said apartments on October 18, 1942, there [37] was then in said apartments personal check books, check stubs of checks that had been issued and also cancelled checks made out to L. V. Scott;

That affiant did not return to the City of Los Angeles until November 5, 1942; that when he returned the said cancelled checks and check stubs were gone from the said apartments; that affiant made inquiry regarding the said missing papers and documents from the manager of the apartment house, and that he was informed by said manager that during his absence from the city investigators from the Federal Bureau of Investigation had entered his said apartments without a search warrant or other lawful authority, and that these men, without displaying any search warrant and stating that such search warrant was unnecessary, took there-

from the checks made out by your affiant to L. V. Scott; that after taking the said checks without a search warrant the said government agents had the same photostated and returned them the next day;

That a week later the government agents returned to the said apartments with a search warrant and at that time removed the said checks and check stubs; that on his return to the city on November 5, 1942, affiant and his wife again occupied said apartments, and that these said checks and check stubs and cancelled checks were not then in said apartment; that neither affiant nor his wife took any of said articles from said apartments; that subsequently affiant saw said [38] articles in the office of the assistant to the Attorney General in the Federal Building at Temple and Main Streets in the City of Los Angeles, California, the said checks and check stubs which he saw there being the ones which had formerly been in his said apartments;

That at no time did affiant give anyone permission to enter or search his said apartments or take therefrom said checks and check stubs; that at no time was affiant served with any search warrant, and at no time did he give anyone permission or consent to the removal of any private documents, papers, checks or articles which were taken;

That affiant's said business at 1005 Broxton Avenue, West Los Angeles, was a personal enterprise, owned by affiant; that at no time did he authorize anyone to take any books, papers, records and documents from the said business; that when affiant left

the City of Los Angeles on October 18, 1942, several books, papers and documents were in his said place of business; that said books, papers and documents were removed without his knowledge or consent, and that he has since seen said books, papers and documents in the office of the assistant to the Attorney General on the 16th floor of the Federal Building, Los Angeles, California; that at no time did affiant consent to the taking of said books, papers and documents, and that at no time was he served with a search warrant, and that he did not know of the taking of these books, papers and documents at the time they were taken. [39]

EDWARD F. ZAP

Subscribed and sworn to before me this 10th day of March, 1943.

ZOA L. ZACCHE

Notary Public in and for said County and State.

[Endorsed]: Filed March, 1943. [40]

[Title of District Court and Cause.]

ORDER SHORTENING TIME

Good cause appearing therefor,

It Is Hereby Ordered that the time within which the motion for inspection of the Grand Jury minutes may be heard be shortened to March 15, 1943, at the hour of 10:00 A. M. or as soon thereafter as the Court can hear said motion.

It is understood that the notice of motion and

motion were served on the Government on Wednesday, March 10, 1943.

Dated: March 12, 1943.

LEON R. YANKWICH
District Court Judge

Received copy of the within Order Shortening Time this 12th day of March, 1943.

JAMES E. HARRINGTON
Attorney for plaintiff [41]

[Endorsed]: Filed March 12, 1943.

[Title of District Court and Cause.]

STIPULATION

It is Hereby Stipulated by the attorneys for the United States of America and the defendant Edward F. Zap that the time within which the motion for inspection of the Grand Jury minutes may be heard may be shortened to March 15, 1943, at the hour of 10:00 A. M., or as soon thereafter as the Court can hear said motion.

Dated: March 12, 1943.

JAMES E. HARRINGTON
GEORGE R. MAURY
WALTER S. BINNS
Special Assistants to the Attorney General War Frauds Unit, Department of Justice

MORRIS LAVINE
Attorney for Defendant Edward F. Zap

[Endorsed]: Filed March 12, 1943. [42]

State of California,
County of Los Angeles—ss.

Zora Frye, being first duly sworn, deposes and says:

I was during the months of September, October, and November 1942 the manager of the Westshire Apartments at 10974, 10976 Wilshire Boulevard, West Los Angeles, California. Mr. and Mrs. Edward F. Zap occupied Apartments 6 and 12 at 10976 Wilshire Boulevard. During the month of October and November, commencing with on or about October 18, 1942, and covering a period until on or about November 5, 1942 Mr. and Mrs. Zap were away, having informed me previously that they were going to Washington, D. C.

During their absence an agent for the Federal Bureau of Investigation came to me and asked me if he could search Mr. Zap's apartment. I asked him at the time if he had a search warrant and he said it wasn't necessary for the F.B.I. There were two agents present. The one agent told me that it was secret government business and asked me to promise him that I wouldn't even tell my employers, the owners of the building, about it. I nevertheless called my employer who told me that if it was an F.B.I. agent to let him in. The agent came back with another agent and I stayed right there while they search around. They went through the desk in the living room, through all the closets, in a chest of drawers in the hall closet. There were

some boxes on the floor of the large closet. They looked through those and found some checks that they were looking for. They said they were taking the checks to make photostatic copies and they would have them back the next day. The next day they brought the checks back and put them into the boxes where they had taken them out. On a following Saturday one of the two men came back and brought another agent named Mr. Myerson with him, and a third. This time they brought a search warrant. This time the men showed me the search warrant and they went into the apartment and took the checks from the same places where they had left them before and have never brought them back to my knowledge.

ZORA FRYE

Subscribed and sworn to before me this 15th day of March, 1943.

EDMUND L. SMITH
U. S. Dist. Cl.
So. Dist of Cal
by THEODORE HOCKS
Deputy

[Endorsed]: Filed March 15, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF ZORA FRYE

State of California,
County of Los Angeles—ss.

Zora Frye, being first duly sworn, deposes and says:

That during the month of October, 1942, I was the manager of the Westshire Apartments at 10974 Wilshire Boulevard, West Los Angeles, County of Los Angeles, State of California; that the exact apartment in which Mr. Edward F. Zap resided with his wife therein was numbers 6 and 12, and known as 10974¼ Wilshire Boulevard, West Los Angeles, California, and that he and his wife occupied the said apartment as a home during the month of October, 1942, and for some time prior thereto and for some time subsequent thereto he and his wife alone resided therein as a home and that they used it for such purpose exclusively; that no one else resided therein during said time but Mrs. Zap and her husband, defendant herein;

That some time in October, 1942, about the middle of [43] the month, two men came to me at the manager's office of said apartment house, and stated that they wanted to go to the Zaps' apartment, numbers 6 and 12, 10974¼ Wilshire Boulevard, West Los Angeles; that these two men then and there stated to me that they were investigators for the F.B.I.; that one of the men produced a Government identification card which had his picture on it; that I examined the picture and the identification and

compared the picture with the man and the name on the card, and it was that man's picture and the name he gave me; I do not, however, remember his name; that the man with the identification card stated that they wanted to search Mr. Zap's (the defendant's) apartment; that I then asked the two men if they had a search warrant and they stated that they did not but that it was not necessary for the F.B.I. to have a search warrant; that I then communicated with my employer, who told me to let the F.B.I. men in; that these men asked me to promise them that I would not talk to anyone about their visit;

That acting on the said representations of these two men that they were Government agents, I then and there admitted them to Mr. Zap's apartment; they searched the desk in the living room and then searched the bedroom and the clothes closet there; they also looked in the chest of drawers, as well as in the closet; they searched Mrs. Zap's dressing room and also searched the kitchen; they then went back into the living room; there is a big closet there where the [44] bed has been taken out to make more room; there were some boxes on the floor of this closet and they searched through these boxes until they found some checks in one of the boxes; one of these Government men then said to the other that this was what they were looking for; this man had slips of paper that he wrote on and marked the places where he then took checks out; this Govern-

ment man then said to me that they were taking the checks to make photostatic copies of them and that they would have them back the next day; the next day these two Government agents returned and brought the checks back and put them in the identical place in the closet where they had abstracted them the day before;

That Mr. and Mrs. Zap were not at home at this time, and that they had left several days before, stating to me that they would be out of the city and were going to Washington, D. C.

That these two Government agents told me they couldn't tell me what they were looking for as it was Federal business; that it was a Federal investigation, and that on account of war conditions that made it more serious, and therefore they requested me to keep the matter most confidential and not to tell even my employers, who, at the time, were Mr. and Mrs. Harold Fendler, both attorneys at law in Los Angeles, California;

That I then and there accompanied the two Government agents back to the apartment of Mr. and Mrs. Zap and they [45] put the checks back in the box from which they had removed them; that when they left they left the slips of paper in the places where the checks had been abstracted by them, as aforesaid;

I again saw one of these Government agents on the last day of October, 1942, at said apartment building; it was the one who had shown me his picture and Government credentials before; he brought

with him a Mr. Murray B. Myerson and another man, whose name I do not remember; he introduced Mr. Myerson to me and said, "Mr. Myerson is another Government agent." The man who introduced me stated that Mr. Myerson and the other man were with the F.B.I. in the Department of Justice; he at that time stated that he himself was attached to the Naval Intelligence branch of the Government; I asked him if that wasn't all the F.B.I. and he said it was just another branch of the Government;

He then stated to me that Mr. Myerson and the other agent had now come out with a search warrant and that they wanted to go to the place where he had returned the checks which had been so previously abstracted and photographed and returned; I had a colored man cleaning in the Zaps' apartment at the time, so I asked the Government agents to wait until I got him out of the Zap apartment residence, and as soon as I did so I took these Government men into the Zaps' apartment and Mr. Myerson and the other agent then signed the search warrant and took the said Zap checks from the places where [46] they had been returned, as pointed out by the first Government agent, who showed them where the checks were; that the first Government agent then and there told me that the other two men were signing the search warrant as he was all through with it and it was going to be in Mr. Myerson's hands from then on, that they were all Government agents and working together, and that the

search warrant which Mr. Myerson had then just left would be all that he would need;

That Mr. Myerson and this first agent and the other man questioned me, the first man doing most of the talking at this time; he asked me what kind of tenants the Zaps were, and I replied that they were the best tenants in the building, honest and responsible and liked by everyone around there, and that they were law abiding and had a very good reputation and always paid their bills.

ZORA FRYE

Subscribed and sworn to before me this 17th day of March, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State.

Received copy of the within this 18th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff. [47]

[Endorsed]: Filed March 19, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled case; that he was arrested on the 5th day of November, 1942, and was in jail on that date, and again on November 25th and until December 7, 1942;

That the Edward F. Zap Aeronautical Engineers was an individually owned concern operating as an experimental agency for and on behalf of the United States Navy, and that affiant was conducting important and confidential research relating to airplane flights adaptable to the Navy fighting planes; that by reason of the nature of his employment and the confidential relationship which existed between him and the United States Navy, books, papers, records, documents, ledgers, job cost sheets, cash books and journal, payroll ledgers and accounts, and other matters, were kept in a [48] large safe in the offices of said concern; that these books, papers and records contained also a large number of reports of statistical data regarding experiments for and on behalf of the United States Navy, and comprised correspondence and records of several years; that the experimental data filled several boxes, and that in all, the files and records of the Edward F. Zap Aeronautical Engineers, when packed, filled about eleven huge boxes; that the correspondence files, alone, were extremely bulky, and that the ledger accounts comprised between eight or twelve large volumes;

That it was impossible for anyone to examine and learn the contents of these books and records with-

out several weeks examination; that affiant employed a bookkeeper and an accountant to keep these books and records, and that naval cost inspectors spent from three to six days a week inspecting the same as a part of their regular routine in order that they might know the contents thereof and send in the reports necessary regarding the same; that it was a physical impossibility, therefore, for anyone to observe and know the contents of the job cost ledger, cost fixed fee ledger, job cost sheets, general ledger and transfer sheets, cash books, check ledger and journal and other papers and documents without a lengthy and prolonged examination;

That after affiant was arrested and released from jail in November 5, 1942, he personally observed Murray B. Myerson and James S. Sloan daily making inspections and [49] examination of the contents of these books, records and documents during the month of November, 1942, except from November 25th to December 7th, 1942, when affiant was again in custody, and that they were making notes thereon; that at no time did said Myerson or Sloan have any search warrant with them or display any search warrant to affiant.

That on or about November 6, 1942, at about 10:00 o'clock in the morning, affiant called several of his employees, to-wit, Harold Dale, Marion Israel, Harold Hanley, Ethel Boyle, Victor Bertagna, George Bates, Eldridge Weaver and Woodrow Smith, and in the presence of each of them and in the presence of Murray B. Myerson and James S.

Sloan, protested against said Myerson and Sloan entering the safe of the Edward F. Zap Aeronautical Engineers, and stated to Murray B. Myerson and James S. Sloan, "It is not right for you to go in there and use Champlin, as he is the crook and is trying to smear me. He has already been fired and has no right to be in the office, and no one has any right to look at these papers as they are the confidential papers of Edward F. Zap Aeronautical Engineers and concern their contracts with the Navy."

That the said Murray B. Myerson and James S. Sloan did not at that time have any search warrant for the examination of the said books, papers, records, ledgers, ledger sheets, cost sheets, payroll accounts, journals and documents; that when affiant protested that no one had any right to [50] enter the safe and look at these confidential records and documents, said Myerson stated that he was going to examine them for himself to find out what facts he could, and said to affiant, "You had better go on home and have a scotch and soda and forget your troubles here." That said agents Myerson and Sloan continued to search and seize books and records and examine same.

That agents of the F.B.I. practically daily searched and inspected these papers, books and documents; that on various dates affiant heard Murray B. Myerson and James S. Sloan ask Ethel Boyle, the bookkeeper, to open the safe and get the cost ledger and other books therefrom, and affiant saw

Miss Boyle, in pursuance of these directions, open the safe for them and take the books and records which they had requested therefrom; that these acts took place in November, 1942, without any search warrant, and affiant heard the Navy auditors protesting against the inspection and examination of these books and records by anyone other than the Zap personnel or the Navy; that affiant heard Mr. Greenfield, an auditor for the Navy, ask Murray B. Myerson and James S. Sloan during the month of November, 1942, the exact day of which affiant does not recall, what authority they had to examine said books and records which were the confidential property of Edward F. Zap Aeronautical Engineers and which were required to be kept confidential for the Navy; that Mr. Greenfield refused to give Mr. Myerson the books and affiant [51] overheard Mr. Greenfield state that he had not seen a search warrant; that thereafter Mr. Greenfield concluded the conversation and continued to work on the books and he at that time refused to turn them over to Mr. Myerson, stating, "After I am through you may do everything you think you have a right to do." That Mr. Myerson then produced his F.B.I. identification and said, "I have a right to do this. I am a member of the F.B.I., and whatever I see fit to do, I account for myself."

That agents daily continued to search, seize and examine books, papers, documents and records, without any search warrant.

EDWARD F. ZAP

Subscribed and sworn to before me this 18th day of March, 1943. ZOA L. ZACCHE
Notary Public in and for said County and State

Received copy of the within this 18th day of March, 1943. JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943. [52]

[Title of District Court and Cause.]

AFFIDAVIT OF ETHEL BOYLE

State of California,
County of Los Angeles—ss.

Ethel Boyle, being first duly sworn, deposes and says:

That she was employed at the Edward F. Zap Aeronautical Engineers and that she worked there as a bookkeeper and accountant during the months of October, November and December, 1942; that some time during the last part of October, and on or about October 31, 1942, Special Agents Murray B. Myerson and James S. Sloan, of the Federal Bureau of Investigation, came into the offices and plant of said firm at 1005 Broxton Avenue, West Los Angeles, California, and identified themselves first of all to the telephone operator as agents of the F.B.I.; that they did not show any search warrant at any time and did not state that they had any search warrant; that they commenced searching the premises and went into the back of the office and into Mr. Zap's private office; [53] that they returned

from that time on daily and spent considerable time each day in the said offices; that at no time on any of these daily visits did they ever, to affiant's knowledge, display or hold any search warrant;

That the Job Cost Ledgers were in the private safe of the Zap Aeronautical Engineers and could not be identified by being "seen and observed"; that the ledger marked "Job Cost Fixed Fee" was also in the said safe, and could not be identified without the safe being opened and a search being made; that the general ledger and transfer sheets, the combination cash book, check register and journal, the payroll ledger and transfer sheets were also in the said safe; that all the employees' time cards were in the private office of Mr. Zap, in a file drawer, and could not be observed by any officer or person; that the cancelled checks of Edward F. Zap Aeronautical Engineers were in the said safe, and the checks of Mr. Zap were in his personal desk—all of them out of observation of any person coming in there, without a search first being made; that all of the checks of Edward F. Zap Aeronautical Engineers and the checks of Edward F. Zap belonging to the firm were in the safe, and the personal check books of Mr. Zap were in his private desk; that all copies of vouchers submitted to the United States Navy and attached supporting documents were in a file next to the auditor, and that this file was closed and at night was locked; that the invoice received by Edward F. Zap from the [54] University of Washington for wind tunnel expense was in a file cabinet;

That affiant was in the office where these papers,

records and documents were handled and knew their whereabouts as a part of her regular duties in the said establishment;

That affiant observed Special Agents Murray B. Myerson and James S. Sloan return to the Zap Aeronautical Engineers at 1005 Broxton Avenue, West Los Angeles, practically every day from October 31, 1942, until long beyond December 2, 1942, and at no time did they ever display to her or show any search warrant, and that during each of these daily visits they made a search and inspection of various time cards, check stubs, vouchers and other papers and documents and made notes thereon; that they frequently asked affiant to get different books from the safe and examined same; that the safe was always locked and had to be opened, and the F.B.I. officers asked affiant to open the same each morning and whenever they wanted something out of it; this took place all through November, 1942.

That affiant knows the construction of the offices and the location of all of the records, papers, documents, ledger sheets, etc. as part of her regular duties at the said plant, and knows that it would have been physically impossible for anyone, merely by looking, to have "observed" the documents and know the contents, as follows: [55]

Job Cost Ledger—Fixed Fee
Job Cost Ledger
General Ledger, and transfer sheets
Combination cash book, check register and journal

Payroll ledger and transfer sheets

Invoice received from University of Washington, Seattle, Washington, dated Aug. 28, 1942

Two books of check stubs

Time cards for weeks ending Sept. 30, 1942 and Oct. 7, 1942

Vouchers and supporting papers relative to contract NXs-4105

Vouchers and supporting papers relative to contract 83142

Cancelled checks of E. F. Zap Aeronautical Engineers and E. F. Zap 9 pckgs. Mar. to Nov. 1942

That affiant personally during November, 1942, was requested to get these documents for Mr. Myerson and did so.

That the checks and check stubs of Edward F. Zap Aeronautical Engineers were in a special drawer, and that those of Mr. Zap were in his private desk, and that the special drawer containing these checks and check stubs did not contain the job cost ledgers or the ledgers regarding jobs with cost plus fees, nor any general ledger sheets nor combination cash books, cash ledger or cash journal, nor the payroll ledger or transfer sheets, nor any employees' time cards, nor any vouchers submitted to the Navy and attached supporting documents, nor any invoice received by Mr. Zap from the University of Washington, and these matters, to affiant's knowledge, could only be observed by a separate and different search and inspection.

That affiant, as the bookkeeper at said establishment, handled the job cost ledger and general ledger and transfer [56] sheets, cash book, cash journal and register and other records, and knows that it would take several days' inspection to learn the contents thereof; that she personally observed Murray B. Myerson, and James S. Sloan examining these documents and records over a period of several days during November, 1942, and making notes thereon; that James S. Sloan copied and made notes on work sheets from the books, and on one occasion he came to affiant and said he could not make his sheets balance and asked affiant if she had a balance and to compare his figures with hers; that he then showed affiant the figures he copied from these books; he at no time showed affiant a search warrant to examine or look at these books; they are the books taken on December 1, 1942.

That some time on or about November 5, 1942, which date affiant recalls was the date of Mr. Zap's arrest, Mr. Murray B. Myerson came to affiant and said he wanted to get a cancelled check for $4,000 which was made out to William H. McAvoy; that at that time he had no search warrant for the same and did not display any; that affiant showed him where the check was in the file and he asked for it and affiant gave it to him; affiant also opened up the safe daily from November 5th until December 4th or 5th, 1942, for Mr. Myerson and Mr. Sloan and they went into the safe and took such books and records as they wanted with them to another part of the building, and would bring them back later in

the day; [57] and then the next day they would again ask for the books and records and again take them to another part of the building, returning them to affiant later in the day to lock in the safe; that these books consisted of the general ledger and transfer sheets, the combination cash book, check-register and journal, payroll ledger and transfer sheets, employees' time cards, the checks and cancelled checks of Edward F. Zap Aeronautical Engineers, copies of vouchers submitted to the United States Navy and supporting documents, the invoice received by Mr. Zap from the University of Washington for wind tunnel expense, and other books, papers and documents.

That affiant is well acquainted with each and all of these books and records, having kept and filed same, and that an examination of same would require at least three weeks to have personal knowledge of their contents and subject-matter; that Agents Myerson and Sloan examined same continuously for from three to four weeks.

ETHYL BOYLE

Subscribed and sworn to before me this 18th day of March, 1943.

FRANCIS DIRGE

Notary Public in and for said County and State

Received copy of the within this 18th day of March, 1943.

JAMES E. HARRINGTON

Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943. [58]

[Title of District Court and Cause.]

AFFIDAVIT OF ESTELLE ZAP

State of California,
County of Los Angeles—ss.

Estelle Zap, being first duly sworn, deposes and says:

That she is the wife of Edward F. Zap, the defendant in the above-entitled case; that she and her husband reside and did reside during the months of October, November and December, 1942, at 10974½ Wilshire Boulevard, apartment 6 and 12, West Los Angeles, California;

That affiant frequently went to the offices of the Edward F. Zap Aeronautical Engineers at 1005 Broxton Avenue, West Los Angeles, California, during the months of November and December, 1942, and particularly from the 5th day of November to December 1, 1942; that on practically every occasion when she went to the said offices she observed Murray B. Myerson and James S. Sloan, of the Federal Bureau of Investigation, in said offices, and that they were endeavoring to examine papers, files, records and documents; that [59] at no time did she observe either of these men with a search warrant, nor did they ever show her a search warrant for the purpose of making an examination of the same, or for making a search of them; or at all, that affiant personally watched the plant and stayed in it during the period when affiant's husband, Edward F. Zapp, was in jail on November 5th, and from November 25th to December 7, 1942;

That the Edward F. Zap Aeronautical Engineers, at all times herein mentioned, was an individually owned enterprise of her husband, Edward F. Zap; that there were also present in the said offices naval auditors and naval cost inspectors, whom she had seen on the premises before, and who were examining books and ledgers as their customary duty; that on occasions she heard altercations between Murray B. Myerson and the naval officers; that in the month of November she overheard Mr. Meyerson ask a naval inspector if he could inspect a book and cost ledger, and that the said naval inspector replied that he could not, that he, the inspector, would not permit Myerson to examine any of the books or ledgers, as they were confidential matters with the United States Navy and that he would permit no examination without further orders; that Mr. Myerson did not produce any search warrant or any legal authority for making any search or inspection, and that at no time during the month of November, 1942, did affiant see Mr. Myerson produce any search warrant for making any examination or inspection of the books, records, [60] documents, ledgers and papers in the said establishment; that nevertheless, Myerson returned each day, and subsequently, during the month of November, and without any search warrant, did examine books, records, documents, papers and ledger sheets in the absence of said naval officer.

That the books, records, ledger shets, financial statements and contracts were all kept in a large,

double-door safe of the Edward F. Zap Aeronautical Engineers, and that in order to examine the same it was necessary to enter this safe and take these various books down; that these books, ledgers, records and other papers filled a space in the safe about three feet long, two feet deep and two feet high, and two feet high, and also several smaller divisions inside the safe that were kept locked;

That the checks and check stubs of said establishment were in a special compartment drawer in said safe, and that they comprised several hundred checks and duplicate check statements; that anyone removing these checks and check stubs could not possibly observe or know the contents of the job cost ledgers, job cost fixed fee ledgers and transfer sheets, combination cash books, cash register and journal, payroll ledger and transfer sheets, employees' time cards, copies of vouchers submitted to the United States Navy, or invoice received by Edward F. Zap from the University of Washington, or any other books, papers and documents, all of which were kept in said safe, and that the type, character [61] and description of said documents could only be learned by reason of a thorough and detailed search and examination lasting over a period of days;

That affiant personally observed Murray B. Myerson and James S. Sloan in the premises of said establishment almost daily from November 5, 1942, making such examinations of said documents during the entire balance of the month of November, and

without any search warrant; that upon the personal knowledge of affiant, as above set forth, affiant believes, and therefore alleges that the affidavit of Murray B. Myerson, dated December 1, 1942, before David B. Head, U. S. Commissioner, Southern District of California, was not based on matters that he observed by reason of being on the said premises on October 31, 1942, in search of checks and check stubs pursuant to an affidavit and search warrant of that date, but was based upon his illegal and continuous illegal examination and search of the said books and documents during the month of November, 1942, which formed the basis of his affidavit of December 1, 1942; that had said affiant, Murray B. Myerson, been able to observe the said books and documents on October 31, 1942, he would have secured another search warrant on that date, or shortly thereafter.

ESTELLE ZAP

Subscribed and sworn to before me this 18th day of March, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State

[62]

Received copy of the within this 18th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF ESTELLE ZAP

State of California,
County of Los Angeles—ss.

Estelle Zap, being first duly sworn, deposes and says:

That she is the wife of Edward F. Zap, defendant herein; that she and her husband have resided alone and exclusively at 10974½ Wilshire Boulevard, West Los Angeles, County of Los Angeles, State of California for approximately two years, and that affiant has never lived at 10976 Wilshire Bouevard, West Los Angeles, California.

ESTELLE ZAP

Subscribed and sworn to before me this 19th day of March, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State

Received copy of the within affidavit this 19th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943. [63]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That heretofore affiant signed an affidavit denominated "Affidavit in Support of Motion to Suppress and Return Evidence Illegally Seized and in Violation of the U. S. Constitution," and which is on file herein, in which it is recited that affiant resided at 10976 Wilshire Boulevard, during October and November, 1942;

That the said statement was inserted in said affidavit by mistake on the part of affiant's attorney, who, so affiant is informed by said attorney, did not know the exact street number of affiant's address, and only knew the building that affiant lived in on Wilshire Boulevard at the time said attorney prepared said affidavit, but said attorney had before him a copy of the search warrant in which it is [64] recited that apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, are occupied by affiant, and said attorney has informed affiant that he assumed that the premises authorized to be searched by said said search warrant was affiant's correct address and acted upon such assumption only, and thereby caused said affidavit to erroneously recite said street address as affiant's residence.

Affiant further avers that in making and signing said affidavit his attention was centered upon the averments therein pertaining to the illegal search and seizure of his property, and affiant failed to note and did not observe that it was erroneously stated in said affidavit that his residence was set forth as above stated, as 10976 Wilshire Boulevard, and that his failure to observe and to correct said error was because of inadvertence upon his part as

aforesaid, and not otherwise, and affiant avers that his correct residence address during the months of October and November, 1942, was 10974¼ Wilshire Boulevard, West Los Angeles, County of Los Angeles, State of California, apartments 6 and 12, and that affiant has never resided at 10976 Wilshire Boulevard, West Los Angeles, California, either during those months or at any other time.

EDWARD F. ZAP

Subscribed and sworn to before me this 19th day of March, 1943.

ZOA L. ZACCHE

Notary Public in and for said County and State

[65]

Received copy of the within affidavit this 19th day of March, 1943.

JAMES E. HARRINGTON

Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943.

[Title of District Court and Cause.]

OFFER OF PROOF

Comes now the defendant herein, Edward F. Zap, and, if permitted to call Murray B. Myerson and James S. Sloan, who, during all times mentioned herein were agents for the Federal Bureau of Investigation attached to the Department of Justice, as witnesses in this proceeding and to examine them, offers to prove by the testimony of said Myerson and Sloan the following facts:

That by reason of the official position of the United States agents Myerson and Sloan it is impossible for defendant Edward F. Zap or his counsel to secure and use herein any affidavits from said Myerson and Sloan, and these facts can only be brought out in examination in open court;

That Murray B. Myerson did not state all of the facts in his affidavit of March 12, 1943, in support of the plaintiff's resistance to the motion to suppress and return evidence; that said Myerson's affidavit is limited solely [75] to the acts of the Federal Bureau of Investigation (Department of Justice) and omits other agents and agencies of the United States Government who acted in the matter; that said Myerson's testimony would prove that prior to October 31, 1942, he received information from other agents of the United States Government, although not necessarily attached to the Department of Justice, but who were an agent or agents of the United States Government assigned to Naval Intelligence; that they, said Government agents, without a search warrant, illegally and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, searched the apartment residence of Edward F. Zap on or about October 20, 1942, and went through books, papers, records and documents and took therefrom, without a search warrant, the following:

Check of Edward F. Zap to L. Scott,
$100.00 dated 8/27/41
100.00 dated 10/30/41
100.00 dated 11/4/41

200.00 dated 1 2 42
100.00 dated 7 18 41
100.00 dated 2 3 42

That on or about said October 20th they illegally and without authority abstracted said checks from Mr. Zap's residence apartment during his absence and took them to a United States Government agency where said checks were photostated by a United States Government photostating machine. [76] and that said checks were returned the next day to the same place from which they had been abstracted by said Government agents; that thereafter said Government agents on October 31, 1942, took Murray B. Myerson and G. C. Earl to the apartment of Edward F. Zap and took from said apartment the checks, from the place where said Government agents had previously returned and placed them after having taken said checks without a search warrant, as aforesaid; that one of said United States Government agents introduced Murray B. Myerson to Zora Frye, the manager of said apartment building, and said that he, Myerson, was going to handle the case from then on; that said Myerson then took the said checks and has kept them since that date.

Defendant offers to prove by said Myerson that he, Myerson, knows who this Government agent is and that he is a United States Government agent, and of what department of the United States Government he is in office.

That said Myerson's testimony would also show that on October 31, 1942, at approximately 4:45

o'clock P. M., he, said Myerson, went to the office of Edward F. Zap Aeronautical Engineers at 1005 Broxton Avenue, West Los Angeles, California, and secured check stubs from a locked box and made a return thereafter as to having received checks and check stubs pursuant to a search warrant issued on October 31, 1942; that each week day thereafter and until December 1, 1942, said Myerson and said Sloan returned to the offices of said [77] establishment at 1005 Broxton Avenue and daily made search and seizure and investigation of the books, records and files of the Zap Aeronautical Engineers; that on November 5, 1942, illegally and without authority, and without a search warrant, said Myerson took a check for $4,000.00 made out in the name of William H. McAvoy; that each day thereafter he continued to return to the said plant and make search and seizure of books, documents, records and papers, without any search warrant, and that said Myerson and said Sloan continued to do so every week day until December 1, 1942; that the affidavit and warrant of December 1, 1942, are based entirely upon the said continuous and constant illegal search and seizure and upon the information thereby obtained, and upon no other information; that the said check for $4,000.00 was taken pursuant to said illegal search and seizure and that all of the other books, documents, papers and records which were taken pursuant to the search warrant of December 1, 1942, as shown by the records and files in this procedure, were taken as a result of said knowledge

gained by said Myerson during the constant illegal search and seizure made during the month of November, 1942;

That the said officers made a return in their search warrant of October 31, 1942, stating that they had completed the search under it; that all searches, seizures and investigations subsequent to October 31, 1942 and to December 1, 1942, were without any search warrant and were illegal; [78]

That said Myerson and said other officers did not learn of the whereabouts, contents or existence of the job cost ledgers, the ledger marked "Job Cost Fixed Fees," the general ledger and transfer sheets, the combination cash book, check register and journal, the payroll ledger and transfer sheets, the employees' time cards, the cancelled checks in the office of Edward F. Zap Aeronautical Engineers and the personal checks and the personal check book of Edward F. Zap, kept in said office, copies of vouchers submitted to the United States Navy and supporting documents, the invoice from the University of Washington for wind tunnel expense, or of either or any of said documents, or any others, kept in the office of said Edward F. Zap Aeronautical Engineers, at any time or upon any occasion when said officers or either of them, entered and searched the residence apartment of said Zap or offices of Edward F. Zap Aeronautical Engineers under authority of a search warrant.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

Received copy of the within Offer of Proof this 20th day of March, 1943 at 11:55 a. m., without waiver of the right of the United States to object that said document is filed late, and later than any time allowed by the Court for filing documents, and without waiver of the right of the United States to object to the document and its contents on the ground that no Offer of Proof was made on Monday, March 15, 1943, at the time of the hearing on the defendant Zap's Motion to Suppress Evidence and for return thereof, and on [79] the ground that no arrangements were made prior to said hearing on said motion for the taking of oral evidence, either with the Government or with the Court, and without waiver of the right of the United States to object to the evidence therein described on the grounds of immateriality, irrelevancy, and surprise, in that now for the first time the defendant Zap purports to allege that some persons other than F.B.I. Agents made some entry into the premises of Edward F. Zap, et ux, used by them as their home, as stated, in and with reference to said Offer of Proof.

JAMES E. HARRINGTON
GEORGE R. MAURY
WALTER S. BINNS

By GEORGE R. MAURY
Attorneys for the United States of America

[Endorsed]: Filed March 20th, 1943.

[Title of District Court and Cause.]

RESISTANCE TO MOTION TO SUPPRESS AND RETURN EVIDENCE

The United States of America, plaintiff above named, by and through the Attorney General, and his duly authorized assistants, resists the motion of Edward F. Zap, a defendant above named, upon the following grounds:

(A) Alleged Search at Defendant's Residence, 10976 Wilshire Boulevard, West Los Angeles, California

I.

That at no time during the month of October, 1942, nor at any other time, did any agents of the Federal Bureau of Investigation (Department of Justice) come to the apartments where defendant and his wife were living without a search warrant; that is to say, that the Government denies specifically the allegations upon information and belief to the contrary as stated in said defendant's motion, page 1, lines 30 to 32, and page 2, lines 1 to 23 inclusive.

II.

On or about the 31st day of October, 1942, a search warrant was duly and regularly issued by the United States Commissioner at Los Angeles, California, in the Southern District of California, Central Division, commanding Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation in Los Angeles, to search those certain premises described as Apartments 6 and 12 at 10976

Wilshire Boulevard, West Los Angeles, California. That said search warrant was issued upon the affidavit of one Harry Champlin and said Murray B. Myerson, particularly describing the place to be searched and the articles and documents to be searched for and seized. That true and correct copies of said affidavits and said search warrant are hereto annexed.

That said affidavit of Harry Champlin speaks for itself and is based upon admissions against interest made by the defendant Edward F. Zap, as therein shown, and is not made upon hearsay and conclusion.

(B) Alleged Searches at 1005 Broxton Avenue, West Los Angeles, California

I.

On or about the 31st day of October, 1942, there was duly and regularly issued by the United States Commissioner at Los Angeles, California, within the Southern District of California, Central Division, a search warrant commanding Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation in Los Angeles, to search those certain premises described as 1005 Broxton Avenue, West Los Angeles, California. That said search warrant described the things to be searched and seized, if found; and the same was based upon the affidavits of Harry Champlin and Murray B. Myerson. That true and correct copies of said affidavits and of said search warrant are hereto annexed. That at no time during the month of October, 1942,

nor at any other time, has any agent of the Federal Bureau of Investigation searched said premises at 1005 Broxton Avenue, West Los Angeles, California, without a search warrant.

II.

On or about the 1st day of December, 1942, there was duly and regularly issued by the United States Commissioner at Los Angeles, California, within the Southern District of California, Central Division, a search warrant commanding Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation in Los Angeles, to search those certain premises described as 1005 Broxton Avenue, West Los Angeles, California. That said search warrant described said premises and the articles to be searched for and seized, if found; and the same was based upon the affidavit of Murray B. Myerson. That true and correct copies of said affidavit and of said search warrant are hereto annexed. That at no time during December, 1942, nor at any other time, did agents of the Federal Bureau of Investigation search said premises at 1005 Broxton Avenue, Los Angeles, California, without a search warrant.

Wherefore, the United States of America prays that the motion of Edward F. Zap be denied.

JAMES F. HARRINGTON
Special Assistant to the Attorney General
GEORGE R. MAURY
Special Attorney
WALTER S. BINNS
Special Attorney

LEO V. SILVERSTEIN
United States Attorney for the
Southern District of California

[Endorsed]: Filed March 15, 1943.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF RESISTANCE TO MOTION TO SUPPRESS AND RETURN EVIDENCE

United States of America,
Southern District of California,
Central Division—ss.

Murray B. Myerson, being first duly sworn, deposes and says:

That he is and at all the times hereinafter mentioned has been a Special Agent of the Federal Bureau of Investigation, stationed at the Los Angeles office thereof within the Southern District of California, Central Division.

That heretofore and on or about the 31st day of October, 1942, he received a search warrant, duly and regularly issued by the United States Commissioner in and for said District, authorizing him to search those premises described as Apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, California; that thereupon he did so, and made his return. That true and correct copies of the affidavits supporting said search warrant, said search warrant, and your affiant's return thereon are hereto attached. That your affiant states of his

official knowledge that no Special Agent of the Federal Bureau of Investigation, during October, 1942, nor at any other time, has searched said premisgs, without a search warrant.

That on or about the 31st day of October, 1942, and again and subsequently on or about the 1st day of December, 1942, there were duly and regularly issued two separate search warrants by the United States Commissioner in and for the said District, authorizing your affiant to search those premises known as 1005 Broxton Avenue, West Los Angeles, California. That on each occasion, under the authority thereof, your affiant did so search said premises, and made his return. That true and correct copies of said search warrants, the affidavits upon which they were issued, and your affiant's return thereon are hereto attached.

That your affiant states that of his official knowledge no Special Agent of the Federal Bureau of Investigation has at any time searched those premises known as 1005 Broxton Avenue, West Los Angeles, California, without a search warrant.

That with reference to the foregoing, your affiant states that those premises known as Apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, California, were, during the time hereinbefore mentioned, occupied as the residence of the defendant Edward F. Zap and his wife. That those premises at 1005 Broxton Avenue, West Los Angeles, California, were, during said times, utilized by said defendant Edward F. Zap in his then business, of doing aeronautical research work and en-

gineering experimental work and construction, largely under contracts with the United States Navy.

Further affiant sayeth not.

MURRAY B. MYERSON

Subscribed and sworn to before me this 12th day of March, 1943.

EDMUND L. SMITH
Clerk of U. S. District Court,
Southern District of California
By.....
Deputy

[Endorsed]: Filed March 15, 1943.

United States of America,
Southern District of California—ss.

SEARCH WARRANT
(Act of June 15, 1917, 18 United States Code 611 to 633)

The President of the United States of America:
To: Murray B. Myerson and James C. Sloane, Special Agents, Federal Bureau of Investigation, their aides and assistants, Greetings:

Whereas, Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation, has this day made and presented before me, the undersigned United States Commissioner, an affidavit and application for search warrant, in which he deposes and says:

That, by reason of violations of 18 U.S.C.A. 80

and 83, a search warrant is desired covering the following described premises:

> The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California. Attached affidavit is made a part of this search warrant.

And Whereas, by reason of said facts, said applicant for search warrant says that at the above described premises there is now possessed and kept two Job Cost ledgers, one identified with the words job cost-fixed fee, the other with job cost; the general ledger and transfer sheets; the combination cash book, check register and journal; the payroll ledger and transfer sheets, and all employees' time cards; all cancelled checks of E. F. Zap Aeronautical Engineers and of E. F. Zap; all check books of E. F. Zap Aeronautical Engineers and of E. F. Zap; all copies of vouchers submitted to United States Navy and attached supporting documents; invoice received by E. F. Zap from the University of Washington, Seattle, Washington, dated August 28, 1942, in the amount of $5,256.63 for wind tunnel expenses.

And Whereas, upon examination of said affiant under oath, I am satisfied from the above recited facts, and do hereby find that there is probable cause to believe that the said violations exist at the above described premises;

Now therefore, you are hereby commanded in the name and [98] authority of the President of the United States, within the time allowed by law, to

enter the said premises above described and with the necessary and proper assistance of persons by you authorized, acting in your presence, in the day or night time, then and there to search the said premises, including outbuilding, cellars, passageways, and rooms connected therewith, for the property, articles and things above described, which may be found to be located in and upon the premises above described or in any part thereof, and to seize and bring the same before me, leaving a receipt therefor with the persons in whose possession or custody they may be found, together with a copy of this warrant; and you are hereby commanded to make due execution of this warrant within ten days from the date hereof and forthwith to make due return to me, together with a written inventory of the property, articles and things seized by you by virtue of this warrant, verified by your affidavit before me.

Witness my hand and the Seal of my office this 1st day of December, 1942.

(s) DAVID B. HEAD
United States Commissioner
Southern District of California

[99]

Pursuant to the within search warrant, there were seized at the office of the Zap Aeronautical Engineers, 1005 Broxton Ave., Westwood Village, Los Angeles, Calif., the following:

1. Job Cost Ledger—Fixed Fee.
2. Job Cost Ledger.
3. General Ledger, and transfer sheets.

4. Combination cash book, check register and journal.
5. Payroll ledger and transfer sheets.
6. Invoice received from University of Washington, Seattle, Wash., dated Aug. 28, 1942.
7. Two books of check stubs.
8. Time cards for weeks ending Sept. 30, 1942, and Oct. 7, 1942.
9. Vouchers and supporting papers relative to contract NXs-4105.
10. Vouchers and supporting papers relative to contract 83142.
11. Cancelled checks of E. F. Zap Aeronautical Engineers and E. F. Zap 9 pckgs. Mar. to Nov., 1942.

11:00 A. M.
Dec. 2, 1942

MURRAY B. MYERSON.
JAMES S. SLOANE
Special Agents F.B.I.
Los Angeles, Calif.

Retd. Dec. 3, 1942. [100]

APPLICATION FOR SEARCH WARRANT AND AFFIDAVIT IN SUPPORT THEREOF

(Act of June 15, 1917, 18 United States Code 611 to 633)

United States of America,
Southern District of California—ss.

On this day, before me, the undersigned United States Commissioner for the Southern District of

California, personally appeared Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation, who, being by me first duly sworn, deposes and says:

That this affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows:

The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California. That affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents.

That, by reason of the above facts, affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things:

Two Job Cost ledgers, one identified with the words job cost-fixed fee, the other with job cost; the general ledger and transfer sheets; the combination cash books, check register and journal; the payroll ledger and transfer sheets, and all employees' time cards; all cancelled checks of E. F. Zap Aeronautical Engineers and of E. F. Zap; all check books of E. F. Zap Aeronautical Engineers and of E. F. Zap; all copies of vouchers submitted to United States Navy and attached supporting documents; invoice received by E. F. Zap from the University of Washington, Seattle, Washington, dated August 28,

1942, in the amount of $5,256.63 for wind tunnel expenses.

Wherefore, affiant prays that a warrant to enter the said premises and there search for and seize the aforesaid books, records, papers, checks and property, be issued.

(s) MURRAY B. MYERSON
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 1st day of December, 1942.

(s) DAVID B. HEAD
United States Commissioner
Southern District of California

[Endorsed]: Filed March 15, 1943. [101]

APPLICATION FOR SEARCH WARRANT AND AFFIDAVIT IN SUPPORT THEREOF

(Act of June 15, 1917, 18 United States Code 611 to 633)

United States of America,
Southern District of California—ss.

On this day, before me, the undersigned United States Commissioner for the Southern District of California, personally appeared Murray Myerson, a Special Agent of the Federal Bureau of Investigation, who, being by me first duly sworn, deposes and says:

That the affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows:

Premises known as 1005 Broxton Avenue, West Los Angeles, California, being the office occupied by Edward F. Zap in an enterprise known as E. F. Zap Aeronautical Engineers.

That he has read the accompanying and supporting affidavit of Harry Champlin, and believes that the facts set forth therein are true.

That, by reason of the above facts, affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things: Checks and check stubs covering payments of money by Edward F. Zap to Lloyd V. Scott.

Wherefore, affiant prays that a warrant to enter the said premises and there search for and seize the aforesaid checks and checks stubs and property be issued.

MURRAY B. MYERSON
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 31st day of October, 1942.

DAVID B. HEAD
United States Commissioner
Southern District of California

[Endorsed]: Filed March 15, 1943.

United States of America,
Southern District of California—ss.

SEARCH WARRANT
(Act of June 15, 1917, 18 United States Code 611 to 633)

The President of the United States of America;
To: Murray B. Myerson and G. C. Earl, Special Agents, Federal Bureau of Investigation, their aides and assistants, Greetings:

Whereas, Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation, has this day made and presented before me, the undersigned United States Commissioner, an affidavit and application for search warrant, and the affidavit of Harry Champlin in support thereof,

That, by reason of violations in Title 18, U. S. Code, Sec. 91, a search warrant is desired covering the following described premises:

Premises known as 1005 Broxton Avenue, West Los Angeles, California, being the office occupied by Edward F. Zap in an enterprise known as E. F. Zap Aeronautical Engineers.

That the facts upon which this warrant is based are set forth in the attached affidavit of Harry Champlin.

And Whereas, by reason of said facts, said applicant for search warrant says that at the above described premises there is now possessed and kept, checks and check stubs.

And Whereas, upon examination of said affiant

under oath, I am satisfied from the above recited facts, and do hereby find that there is probable cause to believe that the said violations exist at the above described premises.

Now therefore, you are hereby commanded in the name and by the authority of the President of the United States, within the time allowed by law, to enter the said premises above described and with the necessary and proper assistance of persons by you authorized, acting in your presence, in the [92] day or night time, then and there to search the said premises, including outbuildings, cellars, passageways, and rooms connected therewith, for the property, articles and things above described, which may be found to be located in and upon the premises above described or in any part thereof, and to seize and bring the same before me, leaving a receipt therefor with the persons in whose possession or custody they may be found, together with a copy of this warrant; and you are hereby commanded to make due execution of this warrant within ten days from the date hereof and forthwith to make due return to me, together with a written inventory of the property, articles and things seized by you by virtue of this warrant, verified by your affidavit before me.

Witness my hand and the Seal of my office this 31 day of October, 1942.

DAVID B. HEAD
United States Commissioner
Southern District of California

[Seal]

[Endorsed]: Filed March 15, 1943. [93]

Pursuant to the within Search Warrant, which was served on E. W. Hanley, Production Engineer, E. F. Zap, Aeronautical Engineers at 3:45 P. M., Oct. 31, 1942, there were seized two (2) books of check stubs.

M. B. MYERSON
G. C. EARL

Endorsed]: Filed March 15, 1943.

APPLICATION FOR SEARCH WARRANT AND AFFIDAVIT IN SUPPORT THEREOF

(Act of June 15, 1917, 18 United States Code 611 to 633)

United States of America,
Southern District of California—ss.

On this day, before me, the undersigned United States Commissioner for the Southern District of California, personally appeared Murray Myerson, a Special Agent of the Federal Bureau of Investigation, who, being by me first duly sworn, deposes and says:

That this affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows:

Apartments 6 and 12 situated at 10976 Wilshire Boulevard, West Los Angeles, California; the aforesaid apartments comprising one unit of living quarters occupied by Edward F. Zap.

That he has read the accompanying and support-

ing affidavit of Harry Champlin, and believes that the facts set forth therein are true.

That, by reason of the above facts, affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things: Checks and check stubs covering payments of money by Edward F. Zap to Lloyd V. Scott.

Wherefore, affiant prays that a warrant to enter the said premises and there search for and seize the aforesaid checks and check stubs and property, be issued.

MURRAY B. MYERSON
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 31st day of October, 1942.

DAVID B. HEAD
United States Commissioner
Southern District of California

[Endorsed]: Filed March 15, 1943.

United States of America,
Southern District of California—ss.

SEARCH WARRANT
(Act of June 15, 1917, 18 United States Code 611 to 633)

The President of the United States of America:

To: Murray B. Myerson and G. C. Earl, Special Agents, Federal Bureau of Investigation, their aides and assistants, Greetings:

Whereas, Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation, has this day made and presented before me, the undersigned United States Commissioner, an affidavit and application for search warrant, and the affidavit of Harry Champlin in support thereof.

That, by reason of violations of Title 18, U.S. Code, Sec. 91, a search warrant is desired covering the following described premises:

Apartments 6 and 12 situated at 10976 Wilshire Boulevard, West Los Angeles, California;

the aforesaid apartments comprising one unit of living quarters occupied by Edward F. Zap.

That the facts upon which this warrant is based are set forth in the attached affidavit of Harry Champlin.

And Whereas, by reason of said facts, said applicant for search warrant says that at the above described premises there is now possessed and kept, checks and check stubs.

And Whereas, upon examination of said affiant under oath, I am satisfied from the above recited facts, and do hereby find that there is probable cause to believe that the said violations exist at the above described premises:

Now therefore, you are hereby commanded in the name and by the authority of the President of the United States, within the time allowed by law, to enter the said premises above described and with the necessary and proper assistance of persons by you authorized, acting in your presence, in the day or night time, then and there to search the said

premises, including outbuildings, cellars, passage-ways, and rooms connected therewith, for the property, articles and things above described or in any part thereof, and to seize and bring the same before me, leaving a receipt therefor with the persons in whose possession or custody they may be found, together with a copy of this warrant; and you are hereby commanded to make due execution of this warrant within ten days from the date hereof and forthwith to make due return to me, together with a written inventory of the property, articles and things seized by you by virtue of this warrant, verified by your affidavit before me.

Witness my hand and the Seal of my office this 31 day of October, 1942.

DAVID B. HEAD
United States Commissioner
[Seal] Southern District of California

Pursuant to the within search warrant, which was executed at the within address at 4:45 P. M. Oct. 31, 1942, there were seized the following:

One (1) book of check stubs,
Check of Edward F. Zap to L. Scott,
$100.00 dated 8/27/41
100.00 dated 10/30/41
100.00 dated 11/4/41
200.00 dated 1/2/42
100.00 dated 7/18/41
100.00 dated 2/3/42

M. B. MYERSON
G. C. EARL

SUPPORTING AFFIDAVIT

United States of America,
Southern District of California—ss.

Harry Champlin, being first duly sworn, deposes and says:

That he is the comptroller employed by Edward F. Zap in connection with the engineering enterprize conducted under the name and style of E. F. Zap Aeronautical Engineers;

That said Edward F. Zap has executory contracts with the United States Navy Department of a confidential nature pertaining to the design of airplanes and armament;

That said contracts provide for inspection by a resident inspector of naval aircraft and the United States Navy Department has assigned as said resident inspector one Lloyd V. Scott in such capacity, and Lloyd V. Scott has been continuously performing the function of resident inspector from November, 1941, down to and including the date of this affidavit;

That since January, 1942, your affiant has observed check stubs pertaining to the bank account of Edward F. Zap with the Bank of America National Trust and Savings Association, Westwood Branch, showing that periodically payments have been made by said Edward F. Zap to Lloyd V. Scott for [94] the purpose of influencing his decision and action in the matter of his official duties as resident inspector of naval aircraft, and in order to

obtain from the Government sums of money in excess of the profit allowed under said contracts:

That on or about March 9, 1942, your affiant saw a check drawn upon said bank account by Edward F. Zap in the amount of One Hundred Fifty Dollars which said check was intended for Lloyd V. Scott as a payment to influence his official action and decision, and said Edward F. Zap has so stated to your affiant the purpose of said check at some time subsequent to March 9, 1942, the exact date of which your affiant does not now recall;

That some time during the first week of June, 1942, said Edward F. Zap told your affiant that he was going to remove the checks and check stubs pertaining to the payments made to Lloyd V. Scott as it was not wise to have such evidence around the office, and that he would take said checks and check stubs to his home;

That two or three days later your affiant had occasion to notice that said checks had been taken away from the office although some of the check stubs were not removed, and your affiant states that the stubs not so removed are to be found at the office of Edward F. Zap at 1005 Broxton Avenue, West Los Angeles, California;

That at all times herein mentioned Edward F. Zap has resided at 10976 Wilshire Boulevard, Apartments 6 and 12, [95] West Los Angeles, California.

(signed) HARRY CHAMPLIN

Subscribed and sworn to before me this 31st day of October, 1942.

DAVID B. HEAD
United States Commissioner
Southern District of California

RKL-ADA [96]

Memorandum of Points and Authorities

A search warrant cannot be issued except upon a showing of facts which tend to establish probable cause.

Veeder v. United States (7 Cir. 1918) 252 F. 414;

Steele v. United States, 267 U.S. 505, 510, 45 S.Ct. 417, 419, 69 L.Ed. 761;

Dumbra v. United States, 268 U.S. 435, 438, 45 S.Ct. 546, 547, 69 L.Ed. 1032.

The members of the Federal Bureau of Investigation are empowered to serve warrants.

5 U.S.C.A. 300(a).

Where the evidence is obtained under a valid search warrant, albeit against the will of the accused, then the search is reasonable, and the evidence is admissible.

Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470.

Where a search is reasonable, it does not invade the rights of the accused.

United States v. Bell, et al., No. 15759, D.C., S.D., Cal.—Jan. 26, 1943.

[Title of District Court and Cause.]

SUPPLEMENTARY RESISTANCE TO MOTION TO SUPPRESS EVIDENCE AND RETURN DOCUMENTS OF EDWARD F. ZAP.

In addition to and supplementary to its previously filed Resistance to a motion of Edward F. Zap to suppress evidence and return documents, The Government, by and through its attorneys, files this Supplementary Resistance, together with the affidavits of Hilton Byars, George B. Maury, and respectfully states to the Court:

That the search warrant issued by the United States Commissioner on or about the 31st day of October, 1942, described the premises of Edward F. Zap as 10976 Wilshire Boulevard, West Los Angeles; that the Government is informed and believes that said premises constitute one apartment in [80] an apartment building, but that the Government feels that same may possibly have been an erroneous description of said premises within the spirit and letter of the Fourth and Fifth Amendments to the Constitution, therefore represents to the Court that solely upon such error, the Government is willing that an Order be entered suppressing the use of the documents obtained from the residence of Edward F. Zap on or about the 31st day of October, 1942, and listed upon the return of Murray B. Myerson, after serving said search warrant, and being the following:

One (1) book of check stubs

Check of Edward F. Zap to L. Scott,
$100.00 dated 8/27/41
100.00 dated 10/30/41
100.00 dated 11/ 4/41
200.00 dated 1/ 2/42
100.00 dated 7/18/41
100.00 dated 2/ 3/42

The Government resists the return of said checks to Edward F. Zap on the ground and for the reason that the Government desires to offer them in evidence in Criminal Action No. 15730 entitled "United States of America v. Lloyd V. Scott," in which said Lloyd V. Scott, the payee named upon the checks, is the sole defendant.

Resistance in this respect is based upon the Government's resistance to the motion of Lloyd V. Scott to be allowed to take advantage of the motion and rulings thereon of Edward [81] F. Zap herein and reference is made thereto.

Dated, Los Angeles, California, March 22, 1943.

Respectfully submitted,

JAMES E. HARRINGTON
Special Assistant to the
Attorney General
GEORGE R. MAURY
Special Attorney
WALTER S. BINNS
Special Attorney
SADIE B. ARBUTHNOT
Special Attorney

[Endorsed: Filed March 22, 1943 [82]

[Title of District Court and Cause.]

AFFIDAVIT OF HILTON BYARS

United States of America,
Southern District of California,
Central Division—ss.

Hilton Byars, being first duly sworn, deposes and says:

That he is and at all times herein mentioned has been a Senior Accountant, a civilian, and employed by the United States Navy in such capacity. That since on or about June 1, 1942, it has been among his duties to assist in the cost inspection and auditing of the books, records and accounts of Edward F. Zap Aeronautical Engineers, located at 1005 Broxton Avenue, West Los Angeles, California.

That said Edward F. Zap Aeronautical Engineers, at all [66] times herein mentioned, has been a solely owned concern, owned by Edward F. Zap, the defendant above named. That said Edward F. Zap was, during the period from June 1, 1942, to and including December 1, 1942, to the knowledge of this affiant, engaged in performing certain aeronautical research and experimental work for the United States Navy under two separate contracts with the United States Navy, wherein said Edward F. Zap was designated in each contract respectively as the contractor. That one of said contracts was designated by the United States Navy and by said Edward F. Zap as Contract NOs-83142, and the other of said contracts was by the United States

Navy and said Zap designated as Contract NXs-4105.

That among the provisions of said Contract NOs-83142 was and is the following clause and proviso:

> "The accounts and records of the contractor shall be open at all times to the Government and its representatives."

That said Contract NXs-4105 contained and does contain, among others, the following clause and proviso:

> "The contracting officer and his authorized representative shall at all reasonable times have access to all records and books of account pertaining to this contract."

That the contracting officer therein mentioned and designated was at the time of the execution of such contract [67] a duly authorized contracting officer in the Bureau of Supplies and Accounts of the United States Navy and entered into said contract for and on behalf of the United States of America; that the United States of America was and is a party to said Contract NXs-4105 and to said Contract NOs-83142.

That on or about the 20th of October, 1942, and for a period of approximately six or seven weeks thereafter, two agents of the Federal Bureau of Investigation were engaged in making an audit and an inspection of the books of account and records of said Edward F. Zap at said place of business, 1005 Broxton Avenue, West Los Angeles, California, un-

der the auspices of and by and with the authority of your affiant, and Lieutenant L. S. Minor, a Cost Inspector of and for the United States Navy, under whose jurisdiction the books and records of said Edward F. Zap had been placed for purposes of audit and inspection, and under and with the authority of said contracting officer and under and with the authority of the United States of America.

That said Special Agents of the Federal Bureau of Investigation so engaged in such audit and inspection were Special Agent Murray B. Myerson and Special Agent James C. Sloane, of the Federal Bureau of Investigation, Department of Justice, with offices at Los Angeles, and that such audit and inspection was made under and by virtue of the foregoing quoted clauses and provisos of said contracts.

That at no time during said period did said Special [68] Agents of the Federal Bureau of Investigation make a search of said premises except upon two occasions when they appeared there with search warrants issued by the United States Commissioner in and for said District, and then and there they seized certain specifically designated books and records. That at all times during said period from on or about October 20, 1942, to and including the 1st day of December, 1942, all said books of account and records of Edward F. Zap pertaining to and under said contracts were within the custody of the United States Navy, pursuant to said contracts and the terms and provisions thereof, and said United

States Navy refused and declined to permit any person whatsoever to remove any of said books of account and records, or either of them, without a warrant.

That at all of said times said books of account and records were available to said Edward F. Zap and to all of his employees, and that no audit or inspection thereof was made by or on behalf of the United States Navy except during ordinary business hours.

Further affiant sayeth naught.

HILTON BYARS

Subscribed and sworn to before me this 20th day of March, 1943.

EDMUND L. SMITH,
Clerk of U. S. District Court, Southern District of California.

By IRWIN HAMES
Deputy. [69]

[Endorsed]. Filed March 22, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE R. MAURY

United States of America,
Southern District of California,
Central Division—ss:

George R. Maury, being first duly sworn, deposes and says, that he is one of the attorneys for the United States of America in the above entitled maf-

ter; that he has read the affidavits of Edward F. Zapp and of Estelle Zapp in the above entitled matter pertaining to the residence of the defendant Edward F. Zapp and the numbering thereof. That in order to determine the actual facts concerning the same, on Saturday, the 20th day of March, 1943, your affiant, together with a photographer, went to the one-nought-nine- [83] hundred block on Wilshire Boulevard, in West Los Angeles, and then and there found that all residence numbers from 10974 to and including 10978 are upon a single lot, and comprise a certain apartment building, and that the separate numerical designations, consecutively from 10974 to and including 10978, are the separate designations of the various apartments, or subdivisions of said building, all upon said lot as aforesaid.

That at said time and place, your affiant caused certain photographs of said building and premises to be taken. That in action No. 15728 said photographs are hereto annexed, marked Exhibits A, B, C, and D respectively. That in action No. 15729, said photographs are incorporated by reference hereto, and are offered in evidence in both of said actions.

That Exhibit A is a photograph designating and showing the major portion of the building which occupies the lot comprising numbers 10974 to and including 10978 Wilshire Boulevard, West Los Angeles, County of Los Angeles, State of California.

That Exhibit B is a closer view of the main entryway to said building and shows graphically the

numbering system employed by the proprietor of said apartment building.

That Exhibit C shows and illustrates the entryway to apartment No. 6 therein, one of the apartments occupied by the defendant Zap.

That the view contained in Exhibit D is directly around [84] the apparent corner shown in Exhibit C, and to the right thereof, and designates the mail box arrangement for Apartments numbered 6 and 12, those apartments which were, during the period involved in these actions, occupied by defendant Edward F. Zap. That while it is indistinct in the photograph, Exhibit D, upon the nameplate under the wording "Apt. 6," the typewritten wording therein indicates the same to be presently the residence of Edward F. Zap; that said nameplate is directly over the number thereof, which is $10974\frac{1}{2}$ —not $10974\frac{1}{4}$ as stated by Edward F. Zap and Estelle Zap in their affidavits.

That your affiant has read the other affidavits of Edward F. Zap, Estelle Zap, Zora Frye, and of Ethel Boyle, all filed since the hearing hereon, and has read the affidavit of Hilton Byars. That your affiant has likewise read the return of service of the search warrant of December 1, 1942, and is familiar with the books and records of Edward F. Zap Aeronautical Engineers therein designated.

That your affiant hereat describes in detail each of said books and records in order that the Court may observe that they are each and all in connection with the business of said Edward F. Zap and in no wise connected with his residential affairs.

(1) Job Cost Ledger—Fixed Fee: This is a book of account, kept by the defendant Edward F. Zap in the course of his business; and is approximately 12 inches by 12 inches [85] by 1 inch thick, stiff-backed, loose leaf, ordinary ledger, with various pages therein under various accounts; said accounts are numbered and said pages are numbered under such accounts. Said book, as your affiant is informed and believes and therefore alleges pertains to the expenses incurred by said Edward F. Zap in performing work under a contract with the United States Navy wherein the total amount to be received as compensation therefor by said Edward F. Zap was to have been a sum certain, regardless of cost.

(2) Job Cost Ledger: This book is in all respects similar to the foregoing Job Cost Ledger—Fixed Fee. The distinction between the two, as your affiant is informed and believes and therefore alleges, is that in this second Job Cost Ledger were kept in detail the accounts of expenses incurred by said Edward F. Zap in performing contracts with the United States Navy on a "cost-plus" basis, wherein and whereby the United States Navy was to have paid said Edward F. Zap his entire cost incurred in performing such contract, plus a fixed fee, or an amount certain, as the profit of said Edward F. Zap.

(3) General Ledger and Transfer Sheets: This book is a book approximately 15 inches in length by 12 inches in width and approximately 2½ inches thick, stiff-backed, and is in all respects an ordinary general ledger containing ledger sheets under the

following headings: General Ledger, Assets, Liabilities, Revenues, Expenses; the accounts therein [86] are indexed in the front, and numbered commencing with Account No. 1.

(4) Combination Cash Book, Check Register, and Journal: This book is the same size as the foregoing described General Ledger, and contains upon the outside thereof the name "E. F. Zap." It contains accounts therein in journal form under the following headings: Cash Received, Check Record, Invoice Record, Payroll Journal. The accounts therein contain records of account of cash received by dates, checks written, by amount of check, check number date written, payee, description of account, and distribution of the expense. The invoice record contains a record of invoices for goods purchased; likewise in columnar manner. The payroll account merely contains total amounts of payroll for various dates. The journal account is by dates, and contains lists of charges and credits of various accounts.

(5) Payroll Ledger and Transfer Sheets: This consists of one red leather covered book approximately 12 inches by 15 inches and approximately ¾ of an inch thick and containing payroll date, the names of employees, the daily time worked by each, the total time, the regular time, overtime charges, and other data pertaining to payroll, including the department or work in which each employee was employed. Transfer sheets indicate transfers, etc., of payroll figures.

(6) Invoice received from University of Wash-

ington, Seattle, Washington, dated August 28, 1942: This is a docu- [87] ment showing certain charges made by the University of Washington to Edward F. Zap for experimental work done in the aeronautical windtunnel at the University of Washington.

(7) Two books of check stubs: These books of check stubs are approximately 4½ inches by 9 inches and each one contains the stubs of approximately 300 checks; after comparison with the check record aforesaid of these check stubs, your affiant is informed and believes that said check stubs pertain to and reflect checks written and subsequently torn from said stubs and negotiated.

(8) Time cards for weeks ending September 30, 1942, and October 7, 1942: These are the time cards of employees kept in the regular course of business during the periods above mentioned.

(9) Vouchers and supporting papers relative to contract NXs-4105: These consist of a folder bound by a fastener at the top, containing carbon copies of vouchers and supporting papers which were presented by Edward F. Zap to the United States Navy for reimbursement under said contract.

(10) Vouchers and supporting papers relative to contract 83142: These are similar to those listed above but pertain to the other contract alleged in the indictment.

(11) Cancelled checks of Edward F. Zap Aeronautical Engineers and Edward F. Zap, 9 packages, March to November, 1942. These were and are cancelled checks returned by the banks upon which

drawn after payment to Edward F. Zap, and all [88] kept in the regular course of business.

Further affiant sayeth naught.

GEORGE R. MAURY

Subscribed and sworn to before me this 22nd day of March, 1943.

EDMUND L. SMITH,
Clerk of U. S. District Court, Southern District of California.

By IRWIN HAMES
Deputy.

[Endorsed]: Filed March 22, 1943. [89]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California,
Central Division—ss.

Mildred Jacobsohn, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 1602 United States Post Office & Courthouse, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above entitled cause.

That on March 22, 1943, she deposited in the United States Mails in the Post Office at Temple and Spring Streets, [90] Los Angeles, California, in the above entitled cause, in a franked envelope, true

copies of the within Supplementary Resistance to Motion to Suppress Evidence and Return Documents of Edward F. Zap, and Affidavits of Hilton Byars and George R. Maury, said envelope being addressed to Morris Lavine, Esquire, attorney for defendant Edward F. Zap, 215 West 7th Street, Los Angeles, California, at which place there is delivery service by United States Mail from said Post Office.

MILDRED JACOBSOHN

Subscribed and sworn to before me this 22nd day of March, 1943.

EDMUND L. SMITH,
Clerk of U. S. District Court, Southern District of California.

By IRWIN HAMES
Deputy. [91]

[Title of District Court and Cause.]

ORDER TO APPEAR AND SHOW CAUSE

To Lieutenant Commander Smith of the United States Navy, and to the United States Attorney:

You and Each of You will please take notice that on the.....day of....., 194....., at the hour of.....M., you are ordered to appear in the United States District Court, in and for the Southern District of California, Central Division, in the courtroom of the Honorable Harry Hollzer, and then and there show cause why you should not forthwith return to Edward F. Zap all of the papers, documents, files, records and pink slip which were taken from

him by the United States Navy following the arrest of said Edward F. Zap, solely to protect public interests.

Dated: December , 1942.

.....

Judge Presiding [102]

[Title of District Court and Cause.]

MINUTE ORDER OF MARCH 24, 1943

The motions of the defendants Edward F. Zap and Lloyd V. Scott, heretofore argued and submitted, are now decided as follows:

(1) The motion of the defendant Zap to suppress the use of documents, filed on March 5, 1943, is granted as to him only as to the use of the documents described as

> "the documents obtained from the residence of Edward F. Zap on or about the 31st day of October, 1942, and list upon the return of Murray B. Myerson, after serving said search warrant, and being the following:
>
> One (1) book of check stubs
> Check of Edward F. Zap to L. Scott,
> $100.00 dated 8/27/41
> 100.00 dated 10/30/41
> 100.00 dated 11/ 4/41
> 200.00 dated 1/ 2/42
> 100.00 dated 7/18/41
> 100.00 dated 2/ 3/42"—

solely upon the ground that the search warrant issued by the United States Commissioner on or about October 31, 1942, insufficiently described the premises occupied by Edward F. Zap therein.

The motion to return the same is, however, denied.

The motion to suppress the use of the other papers, records, documents, and files contained in the same notice of motion of the defendant Zap is denied.

Exception to defendant Zap.

(2) The motion of the defendant Lloyd V. Scott to suppress the same evidence, filed on March 12, 1943, is denied.

Exception to defendant Scott.

(3) The motion of the Government to strike the plea in abatement of the defendant Zap, filed March 5, 1943 and the plea in abatement of the defendant Scott, filed March 12, 1943, is granted and said pleas in abatement, and each of them, are hereby denied.

Exceptions to defendants Zap and Scott.

(4) The "Offer of Proof" filed by the defendant Zap in the office of the Clerk of the Court on March 22, 1943, without leave of the Court and not made in open court, is hereby rejected and the said offer of proof is ordered stricken from the files.

Exception to the defendant Zap.

Dated this 24th day of March, 1943.

Counsel notified.

[Endorsed]: Filed March 24, 1943.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the annexed petition and affidavit of Edward F. Zap, and upon all the proceedings heretofore had herein,

It Is Ordered that the United States Attorney for the Southern District of California, Central Division, and Commander G. A. Smith and Ensign Minor of the United States Navy, show cause before this Court on the 4th day of January, 1943, at the United States District Court House in the Federal Building, Los Angeles, before the Hon. Leon Yankwich on the opening of Court on that day, or as soon thereafter as counsel can be heard, why an order should not be made ordering and directing that all the property taken and held for protective custody only by the said Commander G. A. Smith and Ensign Minor should not be forthwith returned to Edward F. Zap, and why Edward F. Zap should not have such other and further relief as to this Court may seem just and proper; and

It Is Further Ordered that service of a copy of this order, together with the accompanying petition and affidavit, if made upon the United States Attorney for the [103] Southern District of California, Central Division, and upon said Commander G. A. Smith and Ensign Minor, on or before the ..... day of December, 1942, shall be due and sufficient service.

Dated: December ....., 1942.

HARRY HOLLZER
United States District Judge

Received December 24, 1942.
U. S. Attorney, Los Angeles, California.

[Endorsed]: Filed December 24, 1942. [104]

[Title of District Court and Cause.]

OBJECTIONS TO OFFER OF PROOF.

The United States of America, by and through its attorneys, objects to the Offer of Proof herein served by the defendant Edward F. Zap upon the 20th day of March, 1943, at 11:55 a. m., upon the following grounds:

Said Offer of Proof was not made at the time of the hearing herein upon the motion of the defendant Zap to suppress and return evidence; no arrangements were made prior to said hearing on said motion for the taking of oral evidence, either with the Government or with the Court; the evidence offered therein is immaterial, irrelevant, in that it neither tends to prove or disprove any of the grounds [111] of the motion filed by the defendant Edward F. Zap, and upon which such hearing was had; on the grounds of surprise that five days after the hearing upon said motion, the defendant now offers to prove, that some persons other than Federal Bureau of Investigation agents made some entry into the residence of Edward F. Zap, contrary to their allegations in said motion, their grounds set

forth in said motion, and contrary to the affidavits of Edward F. Zap and Zora Frye.

Dated: Los Angeles, California, March 22, 1943.

Respectfully submitted,

JAMES E. HARRINGTON
Special Assistant to the Attorney General
GEORGE R. MAURY
Special Attorney
WALTER S. BINNS
Special Attorney
SADIE B. ARBUTHNOT
Special Attorney

[Endorsed]: Filed March 22, 1943. [112]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California,
Central Division—ss.

Mildred Jacobsohn, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of ~~Los Angeles~~ County, California; that her business address is 1602 United States Post Office & Courthouse, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above entitled cause.

That on March 22, 1943, she deposited in the United States Mails in the Post Office at Temple and Spring Streets, Los Angeles, California, in the

above entitled cause, in a [113] franked envelope, true copies of the within Objections to Offer of Proof, said envelope being addressed to Morris Lavine, Esquire, 215 West 7th Street, Los Angeles, California, attorney for Edward F. Zap, at which place there is delivery service by United States Mail from said Post Office.

MILDRED JACOBSOHN

Subscribed and sworn to before me this 22nd day of March, 1943.

EDMUND L. SMITH,
Clerk of U. S. District Court, Southern District of California
By IRWIN HAMES
Deputy [114]

[Title of District Court and Cause.]

NOTICE TO PRODUCE

To the Special Assistant United States Attorneys in the War Frauds Unit, Department of Justice, United States Post Office and Court House, Los Angeles, California, Attorneys for United States of America in the above entitled cause:

Demand is hereby made upon you to produce at the trial of the defendants in this case the originals of all the documents, records, papers, mock-ups, models, wind tunnel reports, and claims which either are in your custody or in the custody of the United States of America. You are advised that should you

fail to produce the same, the defendants herein will offer [115] secondary evidence relating to the contents, descriptions and details of the same as they relate to

1. Contract No. EXs4105.

2. Contract No. 83142.

3. All correspondence between the Zap Aeronautical Corporation or Edward F. Zap and the Bureau of Aeronautics or the Bureau of Accounts and Supplies, United States Navy Department, relating to each of these contracts.

4. All correspondence between the Resident Inspector of Naval Aircraft at El Segundo and the Bureau of Aeronautics or the Bureau of Accounts and Supplies relating to each of these contracts.

5. All records, vouchers, accounts, books, correspondence, etc., seized from the business premises of the Zap Aeronautical Co. at 1005 Broxton, West Los Angeles.

6. All correspondence between Commander G. A. Smith, Inspector of Naval Aircraft, Santa Monica, with the Bureau of Aeronautics or the Bureau of Accounts and Supplies relating to the above named contracts.

7. All mock-ups, models, wind tunnel reports, airplane test reports, etc.

Respectfully submitted,

HARRY GRAHAM BALTER
Attorney for Defendant Lloyd V. Scott

MORRIS LAVINE
Attorney for Defendant Edward F. Zap

[116]

Received copy of the within Notice to Produce this 3rd day of April, 1943, without waiver of the right of the Government to object that said notice is not served at or within a reasonable time prior to the trial; without waiver of the right of the Government to object that in federal criminal procedure no such notice is contemplated; and without waiver of the right of the Government to object that the notice is not directed to the Government, or to the Attorney General of the United States, or to the Special Assistant to the Attorney General in charge of the prosecution of the above entitled action.

JAMES E. HARRINGTON
et al.,
By GEORGE R. MAURY
Attorneys for the United States of America

[Endorsed]: Filed April 3, 1943.

[Title of District Court and Cause.]

PLEA IN ABATEMENT

Comes now the defendant Edward F. Zap and pleads in abatement to the indictment herein returned that the Grand Jury which returned the indictment was composed entirely of men, and that no women were on the panel from which the said Grand Jury was selected, and that the said Grand Jury was not constituted in accordance with the provisions of Title 28, Section 411, United States Codes Annotated.

Wherefore, defendant prays that the case be dismissed and he be discharged from custody.

Dated: April 1, 1943.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap [117]

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney for Edward F. Zap; that the official minutes of the Court and Grand Jury show that the Grand Jury which returned the indictment was composed entirely of men and that no women were drawn or impaneled to constitute or sit on said Grand Jury; that affiant is an attorney duly admitted to practice in all the courts of the State of California, and that the practice and procedure in the State courts of California is to impanel women as well as men for the purpose of sitting on County Grand Juries and for the purpose of sitting in the trial of cases in court; that there are at present seven women and twelve men on the County Grand Jury; that women as well as men have sat on the County Grand Jury for several years past, and particularly during the time for impanelment of the Federal Grand Jury for this district at the time of the calling of this case;

That the official records of the Federal Court show that no women have been called or impaneled on

the Federal Grand Jury for several years; that the practice of impaneling jurors for the Federal Grand Jury did not and does not conform to the practice in the State courts of California in that only men are called or impaneled for the Federal Grand Jury.

[118]

MORRIS LAVINE

Subscribed and sworn to before me this 1st day of April, 1943.

ZOA L. ZACCHE

Notary Public in and for said County and State.

[Endorsed]: Filed April 6, 1943. [119]

[Title of District Court and Cause.]

OBJECTION OF EDWARD F. ZAP TO JURISDICTION OF THE COURT

Comes now the defendant Edward F. Zap and objects to the jurisdiction of the court to proceed on the ground that he has been deprived of due process of law in the proper preparation and presentation of his defense in this case, in that the Government has, without a search warrant or other lawful process, seized and kept all of defendant's documents, letters, files and records, consisting of from eleven to fourteen boxes, in size approximately six feet long, three feet high and four feet wide, and that he has not had ready and free access to the same, nor has he been able to consult with his attorney privately with reference to them.

That in order to properly prepare his defense it is necessary for this defendant to have these records, files and documents.

Wherefore, defendant Edward F. Zap objects to the proceeding and moves the court for the return of all the documents, records and files so taken, and for a continuance [120] of this case for a period of ten days during which time he may have the return of all his personal files and records and be given an opportunity to prepare his defense.

Dated: April 1, 1943.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

(Adams v. United States, 63 Sup. Ct. Rep. 236).

[Endorsed]: Filed April 6, 1943. [121]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled case; that following his arrest several large boxes of papers, documents and files constituting affiant's personal property and correspondence between himself and the United States Navy, including affiant's personal copies of his contracts, letters, exhibits,

models, mockups, wind tunnel reports, photographs, and his complete filing system, were boxed up and removed by officers and agents of the United States Government to a bomb proof room in the Douglas Aircraft Corporation located at Santa Monica, California, a distance of about twelve miles from the Federal Building in the City of Los Angeles, and approximately the same distance from the office of his attorney, Morris Lavine; [122]

That Commander Smith of the United States Navy stated that these articles were being held solely in protective custody and would be released at any time upon an order of the court or the Navy Department;

That affiant, in company with his counsel has gone to see these articles, which are vital to his defense; that in order to see them it has been necessary to make arrangements at least one or two days in advance, and to go with a representative of both the Army and the Navy into this inclosure; that there are no chairs or other facilities in this room and no ventilation, and that the representatives of both the Army and the Navy remain present during the entire period of inspection; that it is utterly impossible to hold any private conversations or discussions because of the presence of these representatives of the Army and the Navy, and the said room is too small for them not to be within hearing of affiant and his counsel;

That Commander Smith indicated that if affiant would specify what files he wished arrangements

might be made to deliver the same to the office of affiant's counsel, but that affiant is informed and believes, and therefore alleges that Commander Smith has refused, on the advice of Government counsel who are prosecuting affiant, to allow affiant to take these personal files and letters which are necessary in his defense; that affiant is thereby being deprived of due process of law guaranteed by the Fifth Amendment to the Constitution [123] of the United States, in that he is being deprived of his opportunity to prepare adequately his defense in this case and of the right of private consultation with his counsel over records and files that are his personal property;

That on March 30, 1943, affiant went to this shelter at the Douglas Aircraft and endeavored to see some of the records and files of wind tunnel tests which are necessary in the proper defense of his case; that upon entering said shelter where these papers and files are kept, with a representative of both the Army and Navy affiant found that there were several very large boxes each weighing 360 lbs. surrounding the property of affiant, and it was impossible to get into his files by reason of that fact; that when affiant asked to have these boxes removed so that he could inspect his property, the weight of these boxes was too great for the attendants to handle and they stated that there were no other Army representatives available who were permitted to go into this area, and that no one was permitted in this area except by special permission of the

Army; that in view of these facts affiant has been unable to and cannot examine his property; that these papers, records and files are vital to his defense and a proper presentation thereof.

EDWARD F. ZAP

Subscribed and sworn to before me this 1st day of April, 1943.

ZOA L. ZACCHE

[Endorsed]: Filed April 6, 1943. [124]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant Edward F. Zap and moves for a new trial on the following grounds, to-wit:

I.

The verdict is contrary to the law.

II.

The verdict is contrary to the evidence.

III.

The proof does not conform to the pleadings.

IV.

The verdict was decided by lot, or *be* means other than a fair expression of opinion on the part of all the jurors.

V.

The Court misdirected the jury in matters of law and erred in decisions of questions of law arising during the course of the trial.

VI.

The prosecutor was guilty of prejudicial misconduct [125] during the trial of the case before the jury.

VII.

New evidence has been discovered material to the defendant which he could not produce at the trial.

VIII.

Evidence was admitted which was unlawfully seized, in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and which should have been suppressed.

IX.

The defendant was denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

X.

The Court erred in instructions given and refused.

Dated: April 21, 1943.

MORRIS LAVINE
Attorney for Defendant

Points and Authorities

A party can only be tried on the indictment as found by the Grand Jury, and especially upon all its language found in the charging part of the indictment.

Ex parte Bain, 121 U.S. 1, 30 L.Ed. 849;
United States v. Independent Meat & Poultry Market, 32 Fed. Supp. 317;

Gallagher v. United States, 144 Fed. 87, 88; [126]
United States v. Cruikshank, 92 U.S. 542, 557;
United States v. Simmons, 96 U.S. 362, 24 L.Ed. 820;
United States v. Carll, 105 U.S. 611, 26 L.Ed. 1135;
United States v. Britton, 107 U.S. 655, 669, 27 L.Ed. 520, 522, 525;
United States v. Northway, 120 U.S. 327, 332, 334, 30 L.Ed. 664, 665, 666;
Evans v. United States, 153 U.S. 584, 587, 588, 38 L.Ed. 830, 831, 832;
Stoddard v. Palmer, 3 B & C, 20 Pick. 536;
Goodell v. State, 22 Ohio St. 203;
United States v. Mills, 7 Pet. 138;
United States v. Cook, 17 Wall. 167;
Comm. v. Hart, 11 Cush. 130.

The defendant was entitled to an instruction on his theory of the defense in the case as to Section T.D. 5000.

A defendant in a criminal case is entitled to an instruction on the defendant's theory of the case.

People v. Rosen, 11 Cal.(2d) 147, 152.

Received copy of the within Motion for New Trial this 21st day of April, 1943.

JAMES E. HARRINGTON,
Attorney for Plaintiff

[Endorsed]: Filed April 23, 1943. [127]

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes now the defendant Edward F. Zap, and moves in arrest of judgment as follows:

I

The indictment fails to state a public offense.

II.

Count I of the indictment is too vague, indefinite and uncertain as to the nature and cause of the accusation, and fails to descend to necessary particulars as to the alleged claim or claims.

III

Counts IV and V of the indictment fail to apprize the accused of the disbursing officer to whom it is alleged a claim was presented.

IV

Counts IV and V of the indictment fail to set out the claim which it is alleged was presented.

[128]

V

Counts IV and V of the indictment fail to inform the accused of the exact nature and cause of the accusation.

VI

The indictment is vague, uncertain and ambiguous in Counts I, IV and V.

VII

Counts IV and V of the indictment are for the identical offense and charge two different statements of the same offense.

VIII

There are errors on the face of the record in respect to failure to establish any offense.

Dated: April 21, 1943.

MORRIS LAVINE
Attorney for Defendant

Points and Authorities

Where an indictment alleges a written instrument it should be set forth in haec verba.

United States v. Cruikshank, 92 U.S. 542, 557

United States v. Simmons, 96 U.S. 362, 24 L.Ed. 820

United States v. Carll, 105 U.S. 611, 26 L.Ed. 1135

United States v. Britton, 107 U.S. 655, 669, 27 L.Ed. 520, 522, 525

United States v. Northway, 120 U.S. 327, 332, 334, 30 L.Ed. 664, 665, 666

Evans v. United States, 153 U.S. 584, 587, 588, 38 L.Ed. 830, 831, 832. [129]

Stoddard v. Palmer, 3 B&C, 20 Pick. 536

Goodell v. State, 22 Ohio St. 203

United States v. Mills, 7 Pet. 138

United States v. Cook, 17 Wall. 168

Comm. v. Hart, 11 Cush. 130

Received copy of the within Motion in Arrest of Judgment this 21st day of April, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed April 23, 1943. [130]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn on oath deposes and says:

That he is the defendant in the above-entitled case; that by reason of the fact that the documents and records in his case were not delivered to him until the second day of the trial and it was impossible for him to get other facts and data relating to the University of Washington wind tunnel tests as set out in other affidavits, he could not, with reasonable diligence, secure the following data and facts and present them to the Court heretofore:

That affiant was in the University of Washington wind tunnel December 1, 2, 3, 4 and 5, 1941, at which time he was given 41 hours of wind tunnel time at a cost of $512.50; that the University of Washington at that time furnished 940 hours of labor at a cost of $969.80 for computing, making up and [131] reporting wind tunnel tests and data;

That thereafter in February, 1942, affiant went to the University of Washington and testing days were

on February 24, 25, 26, 27 and 28, 1942; that the tunnel time at that time was 45 hours, reaching a total of $562.50; that the labor on that occasion was secured privately by affiant and paid for privately, instead of through the University of Washington; that the University records and files show 256 hours only as being charged against affiant at a cost of $273.63, when the actual amount expended by affiant because of the amount of labor put in, comparable to the labor put in on December 1, 2, 3, 4 and 5, 1941, was $1,035.00;

That on March 2, 3 and 4, 1942, affiant was at the University of Washington and his wind tunnel time was 27 hours at a total cost of $337.50; that the University charged affiant for 232 hours of labor, whereas affiant proportionately used the same amount of labor of his own as the University used on the testing dates of December 1, 2, 3, 4 and 5, 1941, and that his labor charge would have been $611.00, which difference was paid by affiant privately;

That affiant again went to the University of Washington on May 12, 13, 14, 15 and 16, 1942, and the tunnel time then occupied was 35 hours at a cost of $437.50; that in preparing these reports the labor charged by the University was 160.5 hours of student time, or a cost of $168.49, whereas affiant employed students privately and in proportion [132] to the labor performed the cost should have been $805.00;

That during July, 1942, affiant was at the wind tunnel on July 20, 21, 22, 23 and 24, and occupied

the wind tunnel 41 hours at a cost of $512.50; that the only amount expended for labor was 142.5 hours at a cost of $146.52, whereas the private labor in proportion to the work done was approximately $943.00;

That affiant has full and complete reports for all of this work and can establish that all of the above work was accomplished at a substantial saving to the United States of America; that all of these reports are now in the possession of the Government in a bombproof shelter at Douglas Aircraft; that actually, the amounts charged by the University of Washington totaled $817.04; that had the University done all of the work it would have cost the Government approximately $3,394.00; that the difference between $3,394.00 and $817.04 is $2,576.96; that affiant filed a claim with the Government for approximately only $1,950.00 for this work, which was a saving to the Government of approximately $626.96;

That as the University of Washington was operating it took about seven months time to get reports from the University, but that by affiant handling this work privately he was receiving reports and having them completed in from three to five weeks after finishing the work in the wind tunnel.

EDWARD F. ZAP

Subscribed and sworn to before me this 22*st* day of April, 1943.

THEODORE HOCKER
Notary public in and for said
County and State

[Endorsed]: Filed April 22, 1943. [133]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant:

Edward F. Zap, 10974¼ Wilshire Blvd., Los Angeles, California.

Name and address of appellant's attorney:

Morris Lavine, 620 Bartlett Building, Los Angeles, California.

Offenses:

Violation of Title 18, section 80, United States Codes Annotated.

Date of Judgment:

April 22, 1943.

Brief description of judgment and sentence:

Nine months in County Jail, on each count, concurrent, and $2,000 fine on each count, consecutive.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence above mentioned on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I elect not to enter upon the service of the sentence pending appeal, and that the judgment and sentence be stayed pending appeal. [134]

Dated: April 27, 1943.

EDWARD F. ZAP
Appellant

MORRIS LAVINE
Attorney for Appellant

Grounds of Appeal:

1. The indictment is in violation of the Sixth Amendment to the Constitution of the United States, in failing to inform the accused of the nature and cause of the accusation.

2. The indictment violates due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

3. The indictment fails to state a public offense.

4. The District Court erred in refusing a bill of particulars.

5. The District Court erred in refusing to suppress evidence unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

6. The District Court erred in overruling the plea in abatement and motion to quash the indictment.

7. The defendant was denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States in the procedure and proceedings of the case. [135]

8. The District Court erred in refusing defendant permission to inspect the minutes of the grand jury.

9. The District Court erred in overruling the demurrer to the indictment; the indictment is vague, indefinite and uncertain.

10. The indictment also charges two offenses of the same character.

11. The defendant was placed in double jeopardy

on counts IV and V of the indictment, in violation of the Fifth Amendment to the Constitution of the United States.

12. The verdicts are contrary to the law and the evidence; the evidence shows the defendant to be innocent of each of the crimes of which he was convicted.

13. The District Court erred in the admission and exclusion of evidence; evidence illegally seized, in violation of the Fourth and Fifth Amendments to the Constitution of the United States was received in evidence.

14. The District Court erred in refusing the defendant permission, prior to and during the trial, to examine witnesses orally regarding violations of the Fourth and Fifth Amendments to the Constitution of the United States in securing evidence and in refusing to suppress the same as being violative of these amendments.

15. The District Court erred and violated the right of the defendant under the Fifth Amendment in refusing the defendant a continuance for the purpose of preparing for [136] trial after all of his evidence had been taken over by the Government, and in not giving the evidence to him until the second day of the trial.

16. The District Court erred in admitting a check for $4,000 in evidence, applicable to counts IV and V of the indictment, which was illegally seized and used in evidence.

17. The District Court erred in failing to direct the verdicts for this appellant.

18. The District Court erred in failing to hold that a case tried on the theory of a conspiracy did not acquit the defendant Zap equally with the defendant Scott.

19. The District Court erred in instructing the jury to disregard the defendant Scott during the course of the reading of the indictment to the jury. This was an unauthorized change in the language of the indictment and deprived the indictment of validity.

20. The District Court erred in admitting the books in evidence which had been unlawfully searched and seized.

21. The District Court erred in failing to instruct the jury as to the applicable law in the case.

22. The District Court erred in giving improper instructions in the case.

23. The District Court erred in failing to arrest the judgment.

24. The District Court erred in fining and sentencing the defendant on each of counts IV and V of the indictment. [137]

25. The District Court erred in the admission and exclusion of evidence throughout the trial of the case.

EDWARD F. ZAP
Appellant
MORRIS LAVINE
Attorney for Appellant

[Endorsed]: Filed April 26, 1943. [138]

Los Angeles, California, March 15, 1943,
2 o'clock P. M.

The Clerk: 15728, United States of America v. Edward F. Zap and Lloyd Scott.

Mr. Lavine: We are ready, your Honor.

The Court: You may proceed.

Mr. Lavine: At this time, if your Honor please, the defendant Edward Zap moves for the suppression of all of the evidence taken at Apartments 6 and 12, 10976 Wilshire Boulevard, West Los Angeles, California. The correct address is 10974½, Apartments 6 and 12, Wilshire Boulevard, West Los Angeles.

We move to suppress a purported search warrant and also for the suppression of the use of all the matters taken under said purported search warrant, on the ground that it was taken under an illegal search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The defendant Edward F. Zap also moves for the suppression of all of the evidence taken from 1005 Broxton Avenue, the Edward F. Zap Aeronautical Engineers, a personally owned concern, which was also taken under a purported search warrant, and another search warrant following that purported search warrant, based upon information secured during the first illegal search and seizure. [1*]

In connection with those matters there have been affidavits filed. I also have one witness that I want to put on.

*Page numbering appearing at foot of page of original certified Reporter's Transcript.

The Court: We do not allow witnesses at these hearings.

Mr. Lavine: I have an affidavit.

The Court: We do not allow witnesses to be presented except by prearrangement and no prearrangements were made to do it.

Mr. Lavine: Now, if your Honor please, it appears from the affidavit of Zora Frye, who was the manager of the Westshire Apartments where Mr. Zap was residing, that during the months of October and November she was the manager of those apartments and that Mr. Zap was residing at an apartment at 10974, Apartments 6 and 12. The number is actually 10974½. There seems to be some slight difference in the exact address but it was that apartment house.

That during the months of October and November Mr. Zap was gone from the city and an agent of the Federal Bureau of Investigation came to her and asked her if he could search Mr. Zap's apartment. She asked him at that time if he had a search warrant and he said it wasn't necessary. There were two agents present at that time. The one agent told her that it was secret government business and asked her to promise him that she wouldn't even tell her employer, the owner of the building, that he had been there. She nevertheless called her employers and they told her to admit the [2] FBI agent.

The agent then went through the entire apartment from beginning to end and then when he came to a closet they found some checks which they said were

the matters they were looking for and they took the checks saying that they were going to photostat them and bring them back the next day.

They did take the checks and they returned them the next day.

About a week later one of these two men came with Mr. Myerson and another agent and they went directly to where the checks were located and this time they brought a search warrant and displayed the search warrant, taking the checks and they have never returned them.

The affidavit of Mr. Zap is to the effect that these checks were in his apartment when he left for the east and when he came back they were gone and that he subsequently saw these checks in the office of the assistant special attorney general in this building, on the 16th floor, very recently.

The affidavit on which the purported search warrant was based was made out by a Harry Champlin.

It does not allege that there was any crime committed nor that there was any probable cause for any investigation; and the sum total of Mr. Champlin's affidavit is that some time in March of 1942 Mr. Champlin says that he was a comptroller employed by Edward F. Zap and there were certain [3] contracts between the Navy Department of a confidential nature.

He says that in January of 1942 he observed check stubs pertaining to the bank account of Edward F. Zap, showing periodical payments made by him to Lloyd V. Scott, for the purpose of in-

fluencing his decision and action in the matter of his official duties as resident inspector of naval aircraft, and in order to obtain from the Government sums of money in excess of the profit allowed under said contracts.

That on or about March 9, 1942, "Your affiant saw a check drawn upon said bank account by Edward F. Zap in the amount of $150."

Then he says: "During the first week of June, 1942, the said Edward F. Zap told your affiant that he was going to remove the checks and check stubs pertaining to the payments made to Lloyd V. Scott" to his home.

The affidavit was made out on October 31st, 1942.

There is nothing except the conclusions of Mr. Champlin and opinions as to the purpose and the effect and so forth of these checks, and the checks are not specified.

There is no specification in the affidavit as to what checks, what dates they were issued or any particularity at all.

There is no allegation in the affidavit as to any crime having been committed or that there was any probable cause.

The agent himself did not make any further affidavit [4] except one on the basis of Mr. Champlin's affidavit, and he merely states in his affidavit that he is making the affidavit for the purpose of securing a search warrant.

The affidavit of October 31 of Mr. Myerson is that he appears as a special agent, and that the affidavit

was made for the purpose of securing a search warrant for the search of the premises known as Apartments 6 and 12 at 10976 Wilshire Boulevard—"The aforesaid apartments comprising one unit of living quarters occupied by Edward F. Zap."

That he "has read the accompanying and supporting affidavit of Harry Champlin, and believes that the facts set forth therein are true."

He doesn't say for what purpose nor what crime is alleged to have been committed. He doesn't state what knowledge he has of any checks or what checks there are, the dates as between the date when Mr. Champlin is supposed to have conversed with Mr. Zap and the time when the affidavits were made here for the purpose of this search warrant. They are all mere conclusions and a matter of time here that doesn't lead to any reasonable or logical inference from which the court could gather even probable cause for this particular search.

Now, we have, first of all, the fact that a search was made by agents of the government, based upon Mrs. Frye's affidavit, prior to the time that even this search warrant [5] was made on Mr. Myerson's affidavit, based upon this indefinite and vague search warrant without any affidavit of probable cause.

Now, that touches the matter of the search of the apartment.

Now, with reference to the search of the offices of Mr. Zap we have this affidavit by Mr. Myerson himself, based upon his own search on December 1, 1942.

Mr. Myerson says that: "This affidavit is made

for the purpose of securing a warrant for the search of the premises known and described as follows:

"'The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California.' That affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents."

Therefore, by his own admission the taking of the matters under that second warrant of December 1st, are based upon a previous search warrant which he based upon the affidavit of Mr. Champlin and which does not specify what checks or checks stubs or what crime or crimes were alleged to have been committed, and formed no reasonable or logical basis for the second and illegal search warrant.

That is the factual situation, your Honor.

Your Honor can take judicial notice and probably, or [6] at least it is a matter of common knowledge, that where a factory is concerned of the size of this concern, that a large number of checks occur in everyday course of business; that there are employees to be paid; a number of persons receive checks, a number are issued and an affidavit which merely says "Checks and check stubs" without describing any particularity is a fishing expedition which is forbidden by the Constitution.

Now, we have in the affidavit of Champlin mere conclusions and hearsay opinions of Mr. Champlin.

We have the prior search of the apartment by

agents of the FBI. It is true that Mr. Myerson has made an affidavit denying these searches, but he has admitted a second search based upon information gathered during the first search.

Now, the authorities in this matter are well known to your Honor. One of the leading authorities, which I didn't cite in my memorandum, but one which is no less an authority than your Honor himself in the Southern California Law Review under "Lawless Enforcement of the Law", and your Honor has gathered in that work and in other works a number of authorities on the subject of illegal search and seizure.

It has been constantly held by this court and by the Supreme Court of the United States, in the Weeks case, in the Boyd case, in the Agnello case and in a case which is very much like this case and which I did not cite in my authorities, but with which your Honor is no doubt familiar, [7] Gouled v. United States, 65 Law Ed. 647.

The proceedings had in this case are unlawful and the evidence should be suppressed and under the authority of Weeks v. The United States not only should be suppressed but should be returned to Mr. Zap and not permitted to be used in the trial.

The Court: I will hear from the other side. We will hear each motion separately.

Mr. Maury: So far as the validity of the affidavits supporting the search warrant are concerned, we submit them on what they say. There is no going back of that record and we submit that they are sufficient to show probable cause.

Probable cause need not allege necessarily that a crime has been committed, but if there is probable cause to believe there is one committed, and if that is a reasonable inference to be drawn then the requirements are met.

Counsel for the defendant, the moving party, seeks to confuse the court. First of all, I would like to call attention to a distinction. In the first place, in effect, counsel has made two motions, first as to an alleged search and seizure made at the residence of this man and the second as to a search and seizure made at the place of business.

He endeavors to draw out his theory to the effect or conclusion that all of these searches are based upon this original illegal, so-called illegal search warrant. [8]

We will argue the first motion first to this effect: in the residence—confining ourselves to that—we find in reading the affidavit that Mr. Myerson, who is mentioned by Mr. Frye, on the 31st of October received a search warrant duly and regularly issued. We know the Federal Bureau of Investigation is entitled to execute search warrants.

We are all too familiar with the rule. Whether it is right or wrong, it is the rule, that should some private person or some State officer or somebody else make an unlawful search and if that leads to a discovery by Federal officers or if the evidence thereby obtained is turned over to Federal officials, then the same may be used.

The Court: The Supreme Court last week decided two cases. I think it is the McDaniels and

another case and they affirmed the doctrine with this exception, that if those making the search had been identified to the police officers whose action was set in motion by the Federal officers, that they are then agents of the Federal government.

Mr. Lavine: May it please the court, in connection with the factual situation, if there is any question about the facts, we would ask leave for the court to take oral testimony. [9]

The Court: No, I am going on the affidavits. I will go by the affidavits. In other words, we have to determine whether there was any connection. The woman says an FBI man did that. I will have to determine whether that has any weight.

Furthermore, I have to presume that the duty was performed and the law provided specifically any agent of the government of the United States must, upon being asked, show his credentials, and I notice in the second part of the affidavit she states he gave his name as Myerson——

Mr. Lavine: I would ask leave to file a supplemental affidavit on that because I know the facts.

The Court: All right, if you want to file a supplemental affidavit go ahead. [10]

There is no rule that if somebody searches illegally, who is not connected with the FBI, and gives them the information afterwards and then they go and make a legal search, you can't tie the second one to the first one because the courts require that the fruits of the search are only illegal if the person who obtained them was acting as an agent—for in-

stance, in the old prohibition days or now, if an officer stops a man and finds alcohol in his car without a stamp and then turns him over to the FBI, they could use that regardless of the fact that the man did not have a search warrant, even though the cans of alcohol were not in sight and he didn't have a search warrant. In other words, the law insists that before the Government of the United States can be charged with the acts of others so as to invalidate a search, that there be a relationship between the two so that it can be said that they were acting for the Government of the United States. Unless it be shown that a person in the first search was a person acting as officer of the United States the two have to be considered separately.

Mr. Lavine: That is the reason, your Honor, that I have asked leave to take oral testimony and to have Mr. Myerson present and to have my witnesses present so that all the facts can be before the court, and so we may on proper cross examination of the government agents show the relationship.

[13]

The Court: I am never going to make again the mistake I made before in trying a law suit on search and seizure. You can go into all the details you want by affidavit and Myerson is known and you can get his picture and probably have the lady identify him, but we still have the positive denial he wasn't there and nobody under him was there.

Mr. Lavine: May it be understood, then, that I at this time move for leave to take oral testimony

of Zora Frye, Agent Myerson and Agent Earl and have your Honor make a ruling on it so I may note an exception.

The Court: Yes; the motion will be denied. However, an additional affidavit of Zora Frye may be filed. I will give you five days to file the affidavit and the government three days to answer.

Mr. Lavine: Exception.

The Court: I will make it three days because this case is set for trial for the 6th of April, and these matters should be disposed of before that time. I will give you three days to file the additional affidavit and government counsel two days to answer.

Mr. Lavine: May that be understood to mean that I may file any additional affidavits that may identify the agent?

The Court: Yes, any affidavits. I am not limiting you to any affidavits that bear upon the issue.

Mr. Lavine: On the question of two separate issues, your Honor, I think the government rather than the petition- [14] er is the one that is confusing the issue.

If I understand correctly the same affidavit of Harry Champlin, which is filed at the end of the government's opposition and dated October 31st, 1942, was used by Agent Myerson in behalf of both search warrants, for the search of the residence and the search of the business establishment.

The affidavit of Myerson as to the search sets forth—that is not the second affidavit—the first affidavit sets forth that he is basing it upon the infor-

mation furnished him by Mr. Champlin and there was only one affidavit of Mr. Champlin which was the basis for both of the searches.

In other words, it clearly appears from the affidavits of the government agents themselves that their search, both searches were apparently a fishing expedition based upon information which Champlin claims to have possessed in October as to matters that happened in March and June.

The Court: Information may be the basis of a search warrant—information from an outsider may be the basis of a search warrant regardless of how that man obtained information. There is no question that hearsay information is sufficient as grounds for reasonable search and the courts so held in matters like the internal revenue cases.

Mr. Lavine: May I ask your Honor's view on the question of the second search having been made on information gathered from the first search.

The Court: Well, I don't want to decide that until [15] I have the additional affidavits.

Mr. Lavine: That isn't the point—that is an uncontroverted fact established in Myerson's affidavit. He made a second affidavit based on information that he gathered when he was at the factory the first time. I am simply directing my remarks to that situation wherein he states that the "Affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents," so he makes a second search based on his information gathered while he was making the first search.

The Court: Well, even if the first search were illegal that would not invalidate it, because the law does not say how you shall obtain the information.

Mr. Lavine: Assuming then that the first search was illegal and based on the first illegal affidavit, if your Honor holds that that was enough, then we have first the question whether he had a right to go back the second time based upon information he gathered during the first illegal search.

The Court: I will say this right now, assuming it was illegal, if he was on the premises and saw something there he could go back and on the basis of that secure an affidavit stating he believes that certain things are there. Now, let me hear the other motion.

Mr. Lavine: The other motion, your Honor, is a motion [16] to examine the minutes of the grand jury.

The Court: There is no such provision in Federal law.

Mr. Lavine: There is, your Honor.

The Court: Give me the section of the Code.

Mr. Lavine: There is a case, your Honor, in 5 Fed. It is at the bottom of the page.

The Court: That is something I never heard of.

Mr. Lavine: It is the practice in New York, I know.

The Court: It is not the law in district courts.

Mr. Lavine: No, it is a Circuit Court case.

The Court: I haven't run across that. That is something new to me.

Mr. Lavine: There is some law that is still good, your Honor.

The Court: It would have to be something very good before I would approve of that because federal grand juries are not subject to any inquisition on the part of anybody.

Mr. Lavine: The citation is 5 Fed. 343. There are some other cases but I haven't had time to run them down, your Honor.

The Court: I never ran across that. I say frankly it is something very novel.

Well, I wouldn't follow this case even as to the limited extent, because it doesn't conform to my ideas.

Unless you have some other authority, I am very well satisfied that I will not allow the inspection, especially [17] when it is made on the sole ground that you want to discover whether this testimony was used there. Of course, you will discover it was. Even if I held the search warrant was illegal and suppressed it, I wouldn't feel justified in suppressing the grand jury or its indictment.

Mr. Lavine: That is my point, the use of that evidence illegally obtained——

The Court: The Fourth Amendment doesn't apply. A grand jury is a presentment. The Fourth Amendment doesn't say you can't use illegal evidence before a grand jury.

Mr. Lavine: Do I understand that it is your Honor's ruling at this time that the Fourth Amendment doesn't apply?

The Court: No. I am merely saying that I will not grant, upon the showing you made, an inspection of the grand jury minutes, because that is not provided for in the law, and the Congress of the United States has so safeguarded the grand jury that I am not going to interfere with its prerogative by allowing somebody to inspect what went on there.

Mr. Lavine: Exception noted.

The Court: Then the motion to inspect the minutes of the grand jury will be denied, exception allowed. And the motion to suppress will be submitted while we wait for the additional affidavits.

Mr. Lavine: Very well.

Mr. Maury: The defense entered pleas in abatement [18] based largely on the grounds of the alleged illegality of the evidence sought to be suppressed, and the Government has filed a motion to strike, and a demurrer thereto.

The Court: If you want to submit it on the same facts and arguments, all right. I didn't remember. I kind of had an idea there were four.

Mr. Maury: Mr. Binns prepared the argument on that.

The Court: Do you want to argue anything in addition? I notice you covered it in your affidavit. So long as the matter is submitted, I will consider what you have there.

Mr. Lavine: We are willing to submit it on the additional affidavits.

The Court: The factual basis is the same as on the motion to suppress, isn't that correct?

Mr. Binns: Yes.

The Court: The additional question—we don't favor pleas in abatement. I only had one in the Ballard case, that is the one relating to the women on the grand jury, I think it was.

Mr. Maury: There is this additional point. A plea in abatement should not be made on information and belief.

The Court: Let it be submitted on the basis of the affidavits, and you get the affidavits in, and I will dispose of it in advance.

The Clerk: Both cases submitted on the same record?

Mr. Lavine: Yes. [19]

The Court: Any adverse ruling that I made to the defendants, an exception is allowed. [20]

Los Angeles, California, Tuesday, April 6, 1943.
10:00 A. M.

The Clerk: 15728 Criminal, United States against Lloyd Scott and Edward F. Zap, for jury trial.

Mr. Lavine: The defendant Zap is not ready, your Honor, for the reasons set forth in the affidavits which are herewith filed and submitted to your Honor, and I think perhaps if your Honor looks over those affidavits, we would like to argue the matter briefly at the bench.

The Court: With reference to the jury, gentlemen, an opinion was written a year or two ago by Judge Yankwich, which is a very well considered

opinion, and the court, of course, will deny the motion on that ground. All right. You may approach the bench now on this other matter.

(Whereupon the following proceedings were had at the bench.)

The Court: Are you familiar with that opinion of Judge Yankwich?

Mr. Lavine: Yes, I am familiar with it.

The Court: Some time it probably, of course, will go up and have the upper courts probably pass on it. Judge Yankwich gave it a great deal of consideration about a year ago and reviewed the Constitution and the statutes in the State of California, and reached the conclusion which I think is sound, and it was largely on that opinion that I based my ruling. I always want counsel to know on what grounds I [21] make these rulings. I will hear you on the other matter.

Mr. Lavine: Now, your Honor, the defendant Zap is in this position; that due to the barriers placed around him by the taking of the evidence and being placed in the bomb-proof shelter, in part, and some of it was taken by other agents of the Government, we have been in no position to meet the case of the Government at this time.

Last week I went with Mr. Zap, as the affidavit shows, to the bomb-proof shelter, and at the suggestion of Commander Smith, I segregated a number of papers and documents and things which we felt were necessary for the proper presentation of the defense. Both contracts which are in issue here are

in the personal files of Mr. Zap, and in that bomb-proof shelter the various letters, the extending agreements, and all of the various things that relate to this case are there. At all times during our presence in there a representative of the Government, both from the Army and the Navy, were present in the room, which is a very small room and affords no facilities for private consultation or for sitting down or making notes or for a careful and legal, proper study of these matters. Commander Smith stated, before we went over there on this occasion, that if I would segregate the articles we thought we needed, that he would then look them over and later in the day send them to my office. Later in the day he communicated with my office that it was impossible, that he couldn't let us have them. So we are in the position here [22] of having to defend a lawsuit in the absence of those vital papers which the Government itself has taken possession of and which we feel this jury has to have in order to present our case fully and adequately.

Commander Smith, in the earlier proceedings in this case, wrote a letter to Judge Hollzer, stating he would be willing to release those papers, he was only holding them in protective custody, but here we come to the time of the trial, and we felt confident that for this purpose we would have those papers and documents, but we don't have them and we have not had an opportunity to go over some of them which we feel is necessary in the adequate defense of this case.

Now, in the case of Adams vs. The United States, just decided by this term of court, page 87, Law Edition, page 212, Mr. Justice Frankfurter says: "Certain safeguards are essential to criminal justice. The accused must have ample opportunity to meet the case of the prosecution." And he goes on along other principles.

The Court: That has always been true. There is nothing new in that statement of the law. In other words, you cannot indict a man today and then tomorrow morning start the trial of his case without any opportunity for preparation. That has always been the law.

Mr. Lavine: We feel, therefore, that in order to have our case properly presented, we should have the return of those papers which are in the custody of Commander Smith, and [23] particularly those we have designated, which could be carried in possibly a suitcase or two. There are other things there which we will have to demonstrate to the jury and which are vital in our defense, such as models and "mock-ups" and things which the Government charges are involved in this case, and we can only present those adequately to the jury upon a demonstration that the work has been done pursuant to the contract. We are here required to defend ourselves against certain charges, and all our evidence is in the possession of our opponents, and we feel that we want to get this case presented in the fullest light of the truth, and we have to have those to present those matters in the fullest light of the truth.

The Court: All right. What has the Government got to say?

Mr. Maury: If the court please, there are two affidavits of Edward F. Zap filed, one pertaining to the books and documents alleged to be held in the custody of Commander Smith, of the United States Navy, the other pertaining to a certain witness, Harold Dale, who, it is said, was prevented by the Federal Bureau of Investigation, from communicating with Mr. Zap.

As to the second, to put the cart before the horse, I should like to have Mr. Murray B. Myerson, Special Agent of the Federal Bureau of Investigation, sworn and testify shortly as to any conversations that were held with Mr. Dale, [24] to show, first, that the Government did not tell Mr. Dale in anywise that he should not communicate with Mr. Zap, but merely explained to him his rights that if he felt like it he could, and if he did not want to it was his own option.

As to the first, which I previously named, that is books and records having been in custody of Commander Smith since November, 1942, the indictment was returned on the 25th day of November, 1942. Demurrers were interposed and argument on the demurrers was held on the 12th day of January, 1943. Likewise a plea in abatement was subsequently interposed, and various motions have been made before the court, including motions to suppress evidence, and I believe the last of those was disposed of; it was argued in the 15th of March and disposed of a week or eight days later.

Now, Section 636 of Title 28 of the United States Code Annotated, provides that the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue in cases under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery.

Such is the case. The defendant has had since November 25th to make such a motion to be permitted in the ordinary course to inspect these documents. He has come up, both by counsel and by his attorney, to our office and has been granted free inspection of any and all documents in our [25] possession; and so far as Commander Smith is concerned, from his own statement, it appears that he was granted free access to these and permitted to see them at the place where they were stored.

The Court: What connection has Commander Smith now got with the case?

Mr. Maury: Well, the connection, briefly, is this: that Mr. Zap was working on certain experimental aeronautical engineering work under contracts with the Navy specifically designated——

The Court: Yes, that is set forth in the indictment. I read that.

Mr. Maury: Set forth in the indictment. Under those contracts certain materials, certain tests, drawings, engineering data, and other documents were taken by the Navy, under claim of interest, the Navy being interested in those particular materials.

drawings and documents under those contracts; and they have been held by Commander Smith, who is the Inspector of Naval Aircraft for this particular area, ever since.

The Court: I didn't find his name in the indictment or any of the papers. I didn't know where he fit into this particular case.

Mr. Bimms: There was, your Honor, at one time, a motion to return certain evidence, wasn't there, served on Commander Smith? [26]

The Court: Yes, that is in the files.

Mr. Maury: I wish to interpose the further objection that counsel has not in anywise set forth in the affidavits of the defendant, Edward F. Zapp, how or in what manner these said documents or which documents are in anywise germane to the presentation of the case, and I should like to call attention to the Ninth Circuit case of Owyhee Land & Irrigation Co. vs. Tautphaus, 109 Fed. 547——

Mr. Lavine: That is a civil case.

Mr. Maury: ——in which it was stated: "That the remedy afforded by the statute can only be secured upon a proper application before the court, indicating the nature of the books or writings that are sought to be produced, and showing that the evidence sought to be obtained is material to the case of the applicant, and thereupon obtaining the judgment of the court directing its production."

To the same effect is U. S. vs. National Lead Co., 75 Fed. 94. That is also to the effect that the State process is not applicable to federal criminal pro-

ceedings, but that this statute applies. Therefore, there has been no explanation to the court of which letters, contracts, which documents, which exhibits, which models, which "mock-ups", which wind tunnel reports, which photographs, are desired by the defendant, and there is no way in which the Government can tell. And, in closing, that the defendant has had four and a half months in which to make this application to the court. If [27] he has failed to do so, we submit that is at present no cause for a continuance.

Mr. Lavine: In answer to that, your Honor are you through, Mr. Maury? Well, let us take this matter of the continuance up first. If your Honor please, the affidavits and the records show in this case that Mr. Zap suffered an attack of acute appendicitis and that he was in the hospital for quite some time with a ruptured appendix. We did, subsequent to that time, commence our preparation of the case, and we did go to the Douglas bomb-proof shelter. The Government's position is that the defendant, in order to get these affidavits, these papers, documents, models, and so forth, consisting of 11 to 14 boxes, large and full of material, must specify what we need and must inform the Government of defendant's case before we get it. I don't think that that position is tenable. It would be a physical impossibility to state what is in those boxes. We don't know—at least I, as counsel, don't, and my client certainly couldn't be called upon to remember those letters, or where they are, or the

contents of them. The purpose of our effort to prepare for the trial is so that we can see all of them and produce them in court and to study them and have them available. We were lulled into a sense of security by the Commander's assertion that what things we needed or wanted would be sent down to my office and that I could pick them out and segregate them and that there was nothing that they wanted to do to in any way interfere with [28] the trial or in any way prevent us from presenting a full and fair and proper defense. Now we come along to a time that the trial is about to proceed and those particular papers and documents which were promised us are not here. We never have had the contracts. We filed, in the very outset of the case, a request for a bill of particulars, and we asked, among other things, in that request, that we be furnished with the copies of the contracts which are in issue here. We are charged with an action based upon two certain contracts. The Government resisted that motion and we never have had those contracts.

The Court: What was the ruling of the court on that?

Mr. Lavine: The motion for the bill was denied, and an exception duly noted.

We also asked for information relating to the first three counts of the indictment, which relate to the wind tunnel tests at the University of Washington. Our request for a bill of particulars in that respect was denied, so that we don't know what the

charges are that the Government is coming in here to present against us, we only can guess at them; and in order to meet any of those charges we have to be prepared as to all of the wind tunnel tests which were taken at the University of Washington, and all of the bills which are presented, and all of the reports, and those constitute, from a cursory observation, possibly two or three large boxes of material. [29]

We requested a bill of particulars as to the counts 4, 5, and 6 in the indictment, relating to certain phases of the charges regarding the McAvoy flight tests; we were denied that request, and we have to be prepared to meet that on the basis of letters, correspondence, policies, and other matters that relate to that particular flight, and all the data relating to it. We could not possibly set all those up in a form of motion, except in a general way. Those are probably contained in one or two other boxes there in the shelter. * * *

Now, Commander Smith says that on any appropriate order of the court he will let us take any of those things, and we certainly should have them and should have an opportunity for consultation in connection with them. So that in order to carry out our purpose and to be amply protected, in a criminal case, unlike any of the cases the Government has cited, and unlike the situation which we are here confronted with, we requested a 10-day continuance, and an order of this court that we have all those matters made available to us for our private

consultation and study for the proper presentation here in court.

The Court: Mr. Lavine, it is a little unusual, isn't it, to wait until a jury has been called in here, 35 or 40 men, a trial date set, particularly in view of the fact that you have made, according to counsel here, and according to the record, a number of motions before other judges of this court; then to suddenly confront the trial court with a [30] motion of this kind on the opening day of trial?

Mr. Lavine: We are confronted with this unusual situation, your Honor; that only last week we had no reason to believe that there would be any other or different situation than that we would have those matters available to us. The time was then too short to make an adequate motion, and it seemed to me that the time to present the matter——

Mr. Maury: I should like to interpose a statement, your Honor, as an attorney of this court, and the man who has been in charge of this case ever since the indictment was returned, to the effect that neither counsel nor defendants have in anywise applied to our office to ask us to stipulate that they might go and see those documents, that they might be permitted to take them out of the custody of Commander Smith for the purposes of preparing for trial, or in any otherwise to ask our aid or assistance in getting their documents.

I should likewise like to state that Mr. Lavine has called me on several occasions and asked permission to see the documents which are in the pos-

session of the War Frauds Unit of the Department of Justice in this building, and that on each and every of those occasions he has been granted that right, without question. He has been accorded a room, with a table to work upon, and apologies for the poor ventilation of the safe in which those matters are kept, and he has likewise been offered space outside; further, that had he applied to the Department of Justice, every courtesy would [31] have been accorded him, stipulations would have been arranged and entered into, and applications would have been made to the court on behalf of both parties. And we feel that at this time, these papers being filed at 10 o'clock this morning, that they come too late.

Mr. Lavine: I may answer that, your Honor. In reply to the last statement of Mr. Maury, it is absolutely true that every courtesy has been accorded in reference to those papers which were taken under search warrant, or purported search warrants, and which are held pursuant to those, and which require, under the law, that a return be fully made, and that they be deposited with the court or some agent of the Government; and I have been accorded the right to see those and to go over those matters.

The same is not true, however, with reference to the matter of Commander Smith's detention of those papers; that is to say, we have been denied what we thought we would have the right to have. In other words, Mr. Maury's policy in connection with those matters in the office of that unit of the Gov-

ernment in a sense led me to believe that there would be no question about getting the other papers from Commander Smith, and Commander Smith's own statements in that respect were such as to give me the feeling that there would be no difficulty about it at the time of trial or prior to trial.

Now we only had a short time after the denial, and I did not communicate with Mr. Maury about that, but I did [32] have the word of the other custodian, and their prior resistance to our return of those papers originally is in the files here. The Government resisted the giving of those papers to us, and that resistance is in the file.

The Court: Motions will be denied.

Mr. Lavine: Exception is noted.

I have another motion that I wish to make at this time, and I will also renew it after the jury is selected, so that our record is perfectly clear, and we may not have to interrupt so fully at that time.

At this time the defendant, Edward F. Zap, objects to the jurisdiction of the court to proceed on the ground that the indictment as charged in this case and under the proceedings herein had, denies to this defendant, Edward F. Zap, due process of law guaranteed by the fifth amendment to the Constitution of the United States, in this: that he is not informed by the indictment and each count thereof of the nature and cause of the accusations against him so that he may be prepared to meet the charges herein and be prepared to defend adequately against them. The indictment herein, in counts 1, 2, and 3,

charges the defendant, Edward F. Zap, with making certain claims with relation to wind tunnel tests at the University of Washington—a certain claim. Each of these counts charges the same offense in different language. It fails, however, to descend to particulars so that the accused knows what charge it is alleged that he made, or what claim it is alleged that he presented. In [33] view of the fact that this contractor has presented hundreds of claims to the Government, and many of them relate to wind tunnel tests, it is impossible for him to know and be prepared to meet the charges at this time, and, therefore, it is a denial of due process of law guaranteed by the fifth amendment to the Constitution of the United States.

In counts 4, 5 and 6, the allegations are made that he charged a certain $4,000 item, but the allegations in those counts do not descend to particulars and do not inform the accused of the nature and cause of the accusation in such a way that he can know the nature thereof and be prepared to meet it, and, therefore, violates his rights under the fifth amendment to the Constitution of the United States, in that it denies to him due process of law guaranteed thereby. We assert, therefore, that this defendant is denied due process of law guaranteed by the fifth amendment in connection with count 13 as well.

Now we have one other further objection. The Government has split up each of these single claims into three different counts, so that it gives the indictment the appearance of a multiplicity of claims filed falsely against the Government in violation of

due process of law guaranteeing a fair trial to the accused, when, in fact, there is only one claim that has been filed as to each of these different sets of three, and only one alleged claim that is alleged to be false. It is not charged that he filed three false claims, but one [34] false claim as to each of these three items; but to the jury to which a charge of this omnibus nature is presented, it would cause the jury to think there has been a constant series of false claims here, when, in truth and in fact, that is not the actual situation alleged; and we, therefore, object to the form of the indictment as violative of due process of law guaranteed by the fifth amendment to the Constitution of the United States.

We have filed demurrers and also a request for bill of particulars as to each of the counts, which were denied and exceptions duly noted. However, we feel that the fundamental guarantees of the Constitution are involved here. We make this objection in accordance with those fundamental guarantees so that the Government may be apprised, even before the jury is selected, that that is our position and will remain our position throughout these proceedings and trial.

We also join in the demand for an election of counts; but I am premature on that, because if the court sustains my other objections then, of course, that would not be necessary.

Mr. Maury: Does your Honor wish legal argument on these matters?

The Court: You can make a statement for the record.

Mr. Maury: In the first place, the questions raised by counsel have largely been settled by the rulings on the demurrers. As to multiplicity, we are faced with prosecution under a rather peculiar statute. The statute itself [35] contains the reason for the structure, I may say, of the indictment. In the first place, it prohibits or makes criminal the filing of any false claim for payment or approval. That is, you might say, the first category of crime contained in the statute. Second, it makes criminal the filing or the use of a false representation or false statement in any matter within the jurisdiction of any department of the United States. And, third, it specifically sets out a list of various documents, that might for these purposes be read into the record—in fact, it says: "Who shall make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, or affidavit, knowing the same to contain fraudulent and fictitious statements or entries in any matter within the jurisdiction of any department or agency of the United States," and so forth. Hence, the pattern of the indictment is drafted along the pattern of the statute. Yet we feel that where a man, in the course of his business, in the first place, presents a false claim for payment, he has thereby violated the first part of the statute. If he puts false entries upon his books and makes them the basis of that claim, we believe that is another violation of the statute. And, in the third place, if he uses one of these specifically designated types of paper, a false roll, affidavit, or

false account, then we believe that is a violation of the third concept of the statute. Consequently we submit that there is [36] no multiplicity in the indictment. It may be at the close of the Government's proof that some election will be necessary, in which case the Government will probably join in the election; but at this time we feel that there are 12 separate, distinct crimes stated by the first 12 counts of the indictment.

The Court: Hasn't this already been ruled on? I read this file. What have I got to do with it? It is the law of the case.

Mr. Lavine: It isn't the law as far as the trial is concerned. It is the ruling on preliminary matters.

The Court: That is right. That has all been ruled on. Now you are asking me to reverse the ruling in this case?

Mr. Balter: Well, as far as the election is concerned, that is a new matter, your Honor.

Mr. Lavine: We have not raised the question of election. We couldn't raise it until the trial started.

Mr. Balter: I think it is good, too, because if you will read the statute, you will see it is identical.

Mr. Lavine: There is only one claim in each of these three counts, your Honor.

Mr. Maury: Well, the proof will disclose that, Mr. Lavine.

Mr. Balter: It cannot disclose any more than that.

The Court: Well, I see the position of the defendant, but I am inclined to think, gentlemen, they are separate. [37] I don't know what the evidence will show on it. The motion is denied.

Mr. Lavine: Exception noted, your Honor.

May we request at this time that the Government aid us in getting those papers, and documents, and files, from Commander Smith? I don't know how to present it. I think those papers we need for this trial would be offered to us upon any direction of the court. Commander Smith is in court at this time.

Mr. Maury: Supposing we take that up informally at the noon hour, Mr. Lavine? We can straighten it all out.

The Court: If there is any record that the Government has that will aid in this case, I will instruct the defendant be permitted to examine and receive a copy of it. [38]

Los Angeles, California, Wednesday, April 7, 1943.
10:00 A.M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. 15728. United States of America against Edward F. Zap and Lloyd Scott for further jury trial.

Mr. Maury: The Government is ready, your Honor.

Mr. Lavine: In connection with the defendant Zap, your Honor, at yesterday's conference in the morning we made a request for certain documents and articles, and I was assured that they would be here by 10 o'clock this morning. They are not here, your Honor, and we feel thereby we will be deprived of a proper cross examination of certain witnesses.

in connection with the Items 1, 2 and 3, at least, Government counsel tells me they will be here by noon, but we haven't had a chance to see them or examine them, and in view of that situation we cannot answer ready on that matter. We are confronted with that situation.

The Court: Do you know which witnesses you will want them for cross examination on?

Mr. Lavine: If they proceed on Counts 1, 2 and 3, those are the items——

The Court: Then you will be permitted to cross examine those witnesses when the documents are available.

(Counsel for the Government and the defendants and Special Agents Murray B. Myerson and James C. Sloane, [39] approached the bench.)

(The following proceedings were now had at the bench within the presence, but without the hearing, of the jury and defendants.)

Mr. Maury: Your honor, yesterday afternoon after the jury was picked, when the jury was dismissed Juror No. 2 [40] was observed to go over and shake hands with the defendant Scott, and enter into a conversation with him. Mr. Myerson, of the F. B. I., observed this; and Mr. Sloane, likewise of the F. B. I., observed this, and I would like to ask counsel if that juror may be excused and replaced by an alternate on stipulation. It is Juror Wiget.

Mr. Lavine: As far as the defendant Zap is concerned we see no reason why the juror cannot con-

tinue. The mere fact a juror speaks to a defendant, says "Good morning," or something like that, is not any evidence that he is going to swerve from his conscientious duty as a juror in the case. We are confronted every day with that situation, where a juror says "Good morning" or "Good night," and we are in a position of believing that the juries will keep their oaths as jurors. And sometimes to the Judge we say "Good morning" or "Good night." We speak to the judges. We are friendly with them. But we always observe they do their conscientious duty. The mere fact a Judge speaks to an attorney, or the juror speaks to someone connected with the case, does not mean he is in any way influenced by that fact.

The Court: What do you have to say, Mr. Balter?

Mr. Balter: The defendant Scott told me that last night. He said there was a member of the jury stepped up to him and said he had served in the Spanish-American war, or something of that sort, and defendant Scott acknowledged the courtesy, and that is all there was to it. As far as [41] I am concerned, it is up to the discretion of the court.

Mr. Lavine: I raise an objection to the juror being excused on that ground.

Mr. Balter: The defendant Scott doesn't know the person anyway.

Mr. Maury: We object chiefly on the ground that on page 48 of the transcript, it appears, by negative answer, this juror, amongst all the rest, said, under oath, to this court, that he did not know either

party at all, or any of the Government counsel, and that was about 11:30 o'clock in the morning; by 5 o'clock in the afternoon he is very cordially addressing one of the defendants as a man with whom he had had some previous experience, and now it appears it was in the Spanish-American war.

Mr. Lavine: I object to counsel's statement. It doesn't appear there is any connection between the two.

Mr. Maury: It does so appear from Mr. Balter's statement.

Mr. Balter: Scott never served in the Spanish-American war. It seems to be simply a friendly gesture. And this we know, the approach was not made by us, it was made by the juror.

The Court: Who was the juror?

Mr. Maury: Juror No. 2.

The Court: And who was the Government man who saw this?

Mr. Maury: There were two, your Honor. Mr. Myerson [42] and Mr. Sloane.

The Court: Swear Mr. Myerson.

MURRAY B. MYERSON

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maury:

The Witness: It was immediately upon leaving the court room, and I left shortly after 5 p. m. I

(Testimony of Murray B. Myerson.)

left the court room immediately behind the juror, Juror No. 2, and with Special Agent Mr. Sloane right behind me, we entered the corridor together, behind the juror, and the defendant Scott was standing in the corridor, and the juror in the hallway—immediately outside the court room. The juror approached him, put out his hand and called Mr. Scott by name, and referred to the conversation he had with him, I believe a telephone conversation; the exact words I don't remember; I believe he spoke about the sinking of some boat—he had spoken about the sinking of some boat. I cannot recall what words were used with reference to the telephone conversation.

The Court: How did you use the word "telephone"?

The Witness: It is my recollection as the juror left Mr. Scott that he made reference to a telephone conversation which he had brought up in this matter of the boat; with Commander Scott still speaking, and Commander—he left him. [43]

Mr. Lavine: I want to cross examine this man.

The Witness: As they started to speak, I would say I was within five feet of the juror—walking towards the elevator bank. Lt-Commander Scott was immediately outside the court room, facing the court room. The other man was immediately outside of the court room facing Commander Scott. I got just outside of the door, within 18 inches of the juror. I stopped almost immediately, I would say

(Testimony of Murray B. Myerson.)

within 12 or 15 feet of where the conversation was taking place. The juror was speaking in a rather loud voice. I saw no other jurors at the time. I think Special Agent Sloane was right behind me. I don't recall who else was there. I was immediately at the place. I stood still then. That is all I remember. I heard nothing more than what I have told.

JAMES C. SLOANE,

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

As I left the court room yesterday shortly after court adjourned, Mr. Myerson preceded me out in the hallway, when I got out of the court, the second juror,—Mr. Wiget is his name—when he got out in the hallway, Commander Scott was facing him—

Mr. Lavine: We object to that now. He is talking [44] so loud the jury can hear him. He is talking so the jury can hear him.

Gentlemen of the jury, have you heard any of the conversation that has gone on up here before the court? Any juror?

A Juror: I can hear a part.

The Court: What have you heard?

A Juror: Someone mentioned a Juror No. 2. That is all I heard.

(Testimony of James C. Sloane.)

The Court: Did you hear any conversation about it?

A Juror: Nothing other than that.

The Court: You heard the words "Juror 2"?

A Juror: I heard the other man say something about some conversation in the hall. I wasn't paying any particular attention. I was not trying to hear it.

The Court: Now, just tell us exactly what you heard. You heard the words "Juror No. 2" mentioned?

A Juror: Just by the gentleman up there.

The Court: No language?

A Juror: That is all I heard. He turned around and look over this way right after he mentioned it.

The Court: Any other juror?

Another Juror: I heard the same thing, and heard the words, but nothing to make any sense any more than "Juror No. 2."

The Court: Any other gentleman? [45]

A Juror: The only thing I heard was some conversation held in the hall, and I also heard that from this gentleman here.

The Court: You heard no other language about it?

A Juror: That is all.

The Court: I knew they didn't get what we were talking about. Lower your voice now.

The Witness: Just as I came out in the hall——

The Court: No, you are talking too loud.

(Testimony of James C. Sloane.)

The Witness: Commander Scott was in the hall facing the door and as I came out of the court room after Mr. Myerson, shortly thereafter Juror No. 2 came out and spoke to Lt-Commander Scott in a rather friendly tone of voice, asking him if he recalled him, who he was, and he told him at one time —he said, "You remember me? I had a telephone conversation with you." At that time he said, "You remember me?" And I remember particularly this one thing, he said, "You gave me certain information over the 'phone, and then you remember I told you what a good name Scott was." I remember that very distinctly. After I heard that I walked on down the hallway. That is all. I do remember those two things rather specifically.

The Court: Cross examine.

Mr. Balter: The defendant Scott didn't say that he knew this man?

The Witness: Commander Scott was just more or less [46] like I would walk up to anyone after probably—I would say in a rather nonplussed manner—well, maybe I don't recall you.

Mr. Balter: He didn't say he knew this man?

The Witness: I didn't hear him say that he knew the man, no.

Mr. Balter: That is all I care to ask you.

Q. By Mr. Lavine:

The Witness: I was right within three feet and a half of him coming out of the door when I heard this conversation. I think I closed the door and the

(Testimony of James C. Sloane.)

juror came out after me. I don't—I stood there in the hall and lit a cigarette and he walked over and spoke to Mr. Scott. I didn't pay particular attention to the door.

Q. Where was Mr. Myerson?

A. Mr. Myerson had gone on ahead of me a little bit down the hall going—oh, probably six or seven feet on his way down the hall.

Q. And did the juror then walk on?

A. Well, now, after he finished. He shook hands with him and walked on down the hall and left. That is all the conversation I heard; yes, sir. Those two things I remember specifically is all I heard. I didn't hear Scott say anything.

The Court: Now, gentlemen, I have only one interest in all of these cases, and that is to see that we get a fair trial here. Both defendants here are accused of a serious [47] offense, and we want a fair trial here from the Government standpoint, as well as for the defendants, and that is the only interest I have. Yesterday Mr. Lavine objected to one of the jurors for cause, if you will remember, because he was employed by the Government, and in a capacity that did not have any connection with this case at all; technically and properly speaking it was not a proper challenge for cause, in my opinion, but with all these jurors here there was no reason in the world for not granting Mr. Lavine's request, without even hearing from the Government. Why? Because I didn't want the defendants to feel that

(Testimony of James C. Sloane.)

I want any man on this jury who has got any connection, any feeling of any kind, or bias on either side, so I immediately granted Mr. Lavine's request and excused him for cause, which I don't think technically was correct. Now, that is my situation with this juror. This is a serious matter to have a juror go out of this court room and approach a defendant, shake hands with him, and speak to him, particularly when these jurors were warned that they were not to speak to anybody about this matter—twice yesterday. This juror does not seem to appreciate the great responsibility that is upon jurors, gentlemen. Now, that is my position in this case and I feel that this is much more serious than the objection that was made.

Mr. Maury: The Government feels unless counsel are willing to stipulate that the juror may be excused and re- [48] placed by one of the alternates that the Government will be forced to move the court for a mistrial at this point.

Mr. Balter: As far as I am concerned I have no objection to him being excused, just so the rights of this defendant are saved and protected before this jury. I don't want the jury to get anything in the way of a wrong impression here. And, furthermore, I object—I strongly object to any proceeding on the part of the Government of tailing jurors.

The Court: This man just walking out, the record shows, without any intention—they had no idea of speaking to this juror—so if there is any doubt

(Testimony of James C. Sloane.)

about it, gentlemen, I will take it under consideration and study it out, and we can get another juror tomorrow morning on the telephone, because we have a very long and large list here.

Mr. Balter: Couldn't we take an alternate by stipulation and choose the alternate by lot?

The Court: Supposing you have sickness during the trial?

Mr. Lavine: Your Honor, we have made a very serious accusation—the Government has made a very serious accusation against a juror——

The Court: That is right.

Mr. Lavine: And that juror has the right to have his day in court, too, I think.

The Court: I will examine him right now. I will give [49] him his day in court. I will examine him right now.

Mr. Lavine: I think that we have a right to do that.

Mr. Balter: I don't think so. I won't take that position because that juror will be placed in a very uncomfortable position, and he may lean backwards in his decision, and as far as I am concerned he is disqualified.

Mr. Lavine: All right.

Mr. Balter: I mean if your Honor feels he is disqualified, I am perfectly willing to agree to it.

Mr. Maury: Thank you, Mr. Balter.

Mr. Balter: He would be embarrassed in front of himself and all the other jurors. I think under the circumstances, if you feel that way——

(Testimony of James C. Sloane.)

The Court: It is nobody's fault. You gentlemen are not to blame.

Mr. Maury: Not at all.

The Court: I want the record to show that.

Mr. Balter: Thank you, your Honor.

The Court: I want the record to show you did not make the advance, the advance was made by the juror. That is what the testimony shows. And particularly an officer in the Navy, I am sure he would not make an advance to a juror in the trial of his case; he may have slipped in some other matters, I don't know, but he wouldn't do that, in my opinion.

Mr. Lavine: I may say, that I particularly cautioned my client not to blush almost at the jurors, so we have [50] been very careful that nothing like this would happen, and we regret the situation very much, but I don't like to have the whole setup upset here, we have spent considerable time with the court and all of the parties to try to proceed properly.

Mr. Balter: I think we ought to proceed with one alternate and then we can stipulate——

Mr. Lavine: All right.

Mr. Balter: We are willing to stipulate that one of the two alternates be drawn by lot, and we have only one alternate, and if any untoward reason arises, which we cannot foresee, we will stipulate the case may be decided by 11 jurors.

Mr. Maury: The Government is willing to so stipulate.

(Testimony of James C. Sloane.)

Mr. Lavine: And I will join in that.

Mr. Balter: Your Honor, use your own good judgment as to how to handle this situation, so that the rest of the jury gets no feelings about this.

The Court: I will just excuse him. They will never know anything about it. It is none of their business.

Mr. Balter: You handle that in your own way, your Honor.

The Court: I am not going to embarrass anybody.

Mr. Balter: Thank you, your Honor.

(Proceedings were now resumed within the hearing of the jury and defendants.) [51]

The Court: Mr. Wiget, you will be excused from further jury service. You will be excused.

Mr. Cross, will you place in the box the names of Mr. Tom T. McCarty and Mr. Marks?

The Clerk: Yes, your Honor.

Juror No. 2: May I stay in the court room?

The Court: You are excused. The two alternates that have been heretofore drawn and are serving and sitting in the jury box, will you please draw one of those to replace the juror, Mr. Wiget, who has been excused?

The Clerk: Mr. C. E. Marks.

The Court: Mr. Marks, you take that seat.

Gentlemen of the jury, I will now read to you the charges, in the simple language, called the "Indictment."

(Testimony of James C. Sloane.)

(The indictment was then read to the jury.)

Mr. Maury: At this time, your Honor, may I call attention to the fact that Commander C. A. Smith, of the United States Navy, has the documents and records which [52] Mr. Lavine has been requesting, and that I should like to tender them to Mr. Lavine for his scrutiny, at any convenient time.

Mr. Lavine: Yes, your Honor, may we have the record show that at 11:20, on the second day of trial, that the documents in the possession of the Government vital to the defense have been tendered to the defense?

Mr. Maury: Stipulate that that is the time of day, Mr. Lavine.

Mr. Lavine: Yes, sir. At this time I wish to renew my motion made before the trial commenced, at the bench, that the defendant is denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and on all the grounds therein set forth at that time.

The Court: The motion will be denied.

Mr. Lavine: Exception noted.

COMMANDER G. A. SMITH,

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Glenn Albert Smith.

(Testimony of Commander G. A. Smith.)

Direct Examination

By Mr. Maury:

Q. What is your rank, sir? [53]

A. Commander of the United States Navy, retired, on active duty.

Q. How long have you been connected with the United States Navy?

A. Since 1907. I entered the Navy in 1907, graduated from the Naval Academy at Annapolis in 1911; served in the Mexican war, in the Caribbean, served in Cuba several times, where I went ashore with the Bluejackets looking out for American interests; 1914 and 1915 I was on special duty in the Mediterranean, and in certain parts of Europe; in 1917 I had command of the mine forces preparatory school at Newport; later was mining officer on the "Hoositanic", which with other ships in the American mine forces put down a mine field between Scotland and Norway; after the war I went into aviation, had command of several squadrons and training activities, assembly and repair duties; was air officer of the aircraft carrier "Lexington" for two years, and my last sea duty was as captain of the destroyer "Elliott."

Q. Where are you stationed now, sir?

A. Stationed at the Douglas Aircraft Company, Santa Monica, California.

Q. How long have you been so stationed?

A. For a little over two years.

(Testimony of Commander G. A. Smith.)

Q. What have been your duties during that period of time?

A. Inspector of naval aircraft. [54]

Q. Are you acquainted with the Aeronautical engineering plant of the defendant, E. F. Zap?

A. Yes.

Q. By Mr. Maury:

I am familiar with these two contracts which have been discussed; that is contract 83142, between the Navy and the defendant Zap, and with contract No. NXs-4105.

(Government's Exhibit No. 2 was offered in evidence and admitted as to the defendant Zap, and was thereupon read by Mr. Maury to the Jury.)

Mr. Zap subcontracted in the first stages of his work. To the best of my knowledge, the first contract or subcontract was with Northrup. Well, as a matter of fact, Mr. Zap had an earlier contract, No. 75017 and 75020 with the Northrup at that time. The 83142 was largely performed at Hardman Aircraft, and after that by Hamilton, as subcontractors to E. F. Zap. In other words, at that time Zap did the experimental work, the experimental engineering, but the actual work that was being done on contract was being done, first of all, by Northrup.

After contract 83142 was let, the first work on that was done by Hardman Aircraft. Zap and his staff simply did the engineering work and let out the subcontract to Hardman. The production or manufacturing work was done—the first of it was done by

(Testimony of Commander G. A. Smith.)

Hardman. Then Hardman went into bankruptcy [55] There was quite a delay there in performing Zap's work on account of that. I wouldn't say it was about four months delay. I wouldn't say it was that long. We got that matter straightened out and we thought fairly promptly. At any event there was some delay, and the Navy and I cooperated [55-a] in trying to see that it got straightened out so that the Zap production could go ahead in every way possible.

After the Hardman difficulties there was another subcontract let to Hamilton Aero. In other words, Zap and his organization merely did the engineering, and Hamilton Aero was doing the actual manufacturing or construction. To the best of my knowledge, Hamilton Aero continued out there at the Hardman plant for several months and then rented and started another plant in Beverly Hills. Then in the earlier part of 1942, about May 22nd, the Defense Plant Corporation agreed to build Zap a plant for his own purposes, to go ahead and do the work in his own plant. Sponsored by the Navy, the D.P.C. obtained a plant. I helped all I could to advance the interests of E. F. Zap, and forwarded letters to the Bureau in connection with that plant and approved its construction.

Q. I will show you a letter, Commander Smith, and ask you if that is a copy of a letter that you sent to the Bureau, approving of the plan to provide Mr. Zap with a plant of his own in Westwood?

(Testimony of Commander G. A. Smith.)

Mr. Maury: Government stipulates that it was, Mr. Lavine.

The Court: All right.

Mr. Lavine: Accept the stipulation and offer the letter in evidence.

"From: Inspector of Naval Aircraft, USN, c/o Douglas [56] Aircraft Company, Inc."

The Court: Just a minute, now, until we get the number of that, so that we will have our record.

Mr. Lavine: Pardon me. I am sorry.

The Clerk: That will be Defendant Zap's Exhibit A.

(The document referred to was marked as DEFENDANT ZAP'S EXHIBIT A; and was received in evidence.)

Mr. Lavine: "From: Inspector of Naval Aircraft, USN, c/o Douglas Aircraft Company Inc., Santa Monica, Calif.

"To: The Chief of the Bureau of Aeronautics.

"Subject: BuAer Reqn. 315—Series 1942—Schedule 500-3808—Proprietary—Experimental Program of Construction of Folding Wings and Center Section Incorporating Zap Full Span Flaps and Ailerons for Model F4F-3 or F4F-4 Airplanes. (R.I.N.A. El Segundo, Calif. letter F4F (A-4) (C-150) dated 22 May 1942)

"1. Forwarded for the Bureau's consideration.

(Testimony of Commander G. A. Smith.)

"2. The plan outlined in basic letter appears to offer the best method of providing needed facilities to the Zap Corporation to enable them to fulfill their obligations to the Bureau under the forthcoming subject contract.

"3. Approval of this plan is recommended provided it does not block or delay the present [57] approved plant expansion in the area in the case of Pacific Aviation, Plan or Number 828.

"4. It is recommended that this correspondence be shown to Lt. Comdr. G. Norton, U.S. N.R. of the Plant Facilities Section of the Bureau.

"G. A. SMITH

"Comdr. USN (Ret.)"

Mr. Maury: May it be stipulated, Mr. Lavine, that the reference to the Zap Corporation therein is a misnomer; that no corporation was involved?

Mr. Lavine: That is correct. It may be stipulated that the Zap Corporation, which may be shown in various places as such, is E. F. Zap, as an individual; that that was simply used as a name at frequent times. I think it appears in other correspondence and other documents that may come up, so I am willing to stipulate that they refer to E. F. Zap individually, operating as Zap Engineers or Zap Engineering Corporation, or Zap Corporation; that in all those cases it refers to E. F. Zap. I would also like to call attention to that paragraph three there

(Testimony of Commander G. A. Smith.)

which says that this is not to interfere with any plant expansion in the case of another company:

By the Witness:

Now, in connection with this plant—it was fully set up and equipped. It was rented, occupied, and being equipped. It was not fully equipped. The Government spent approximately $67,000 on that. You could get the exact information [58] from the Defense Plant Corporation on that. I, myself, approved many other things at the Zap plant, however, prior to that time. I approved any and all matters to successfully prosecute that contract that was referred to me.

Mr. Lavine: That is all, thank you.

Recross Examination

By Mr. Lavine:

Q. Commander, in connection with the vouchers that are submitted to the Navy Department for payment, you were the one that approved those vouchers, weren't you?

The Court: Vouchers for what?

Mr. Lavine: Vouchers for payments for money or claims in connection with contract 83142, and 4105.

The Witness: I approved a very few of those, and I would prefer that any questions about vouchers be addressed to the Navy Cost Accounting Officer whose specific duty it was to handle matters like that.

(Testimony of Commander G. A. Smith.)

Q. By Mr. Lavine: But you did approve some of them?

A. I approved some—I authenticated some expenditures, under these two contracts, but information in regard to that should be obtained by the man detailed specifically to handle it.

Q. By Mr. Lavine: Well, Commander, I show you some memorandums here, the last one being November 17, 1942, "Public Voucher for cost-plus contracts." "G. A. Smith." [59] Made out to "Aviation, Navy, Edward F. Zap, United States Debtor, to Edward F. Zap, NXs 4105, 15th May, 1942." Is that one you approved?

A. I would like to answer this by calling your attention to the fact that the Navy cost acounting officer certifies all of these vouchers prior to submitting them to the right officer for authentication, and any question in regard to the finances, I repeat that I think they should be referred to the officer detailed to handle the auditing and the accounting. In other words, I usually rely on the auditor; when he comes to me and says, "This is correct," then I rely on him and sign my name. The original might have my signature on it. I have approved vouchers in the amount of approximately $4,235.45, but right at this minute I couldn't identify that because of the large amount of vouchers of that nature I handled with other companies. Here is one dated September 30, 1942, which is for $1,040.24, I believe, amount payable, and it has my name on the left hand side

(Testimony of Commander G. A. Smith.)

and Minor's on the right hand side—I relied on the fact that the Naval Cost Inspector approved that one. They go on to the proper authority. In matters of this nature, where so much money is involved, the cost accounting officer will have a copy of all correspondence. In matters involving the countersigning of checks I have a record of each and every check, but in the matter of the vouchers and the claims, the cost accountant is the one who handles those primarily. [60] I rely on his accounting for the purpose of my examination and signature—he and his assistants. And to all of these various memorandums here, assuming that I signed the originals: dated July 3, 1942, to Edward F. Zap, in the sum of $10,829; and July 18, 1942, in the sum of $5,289.30; and in the sum of $6,677.81, dated August 6, 1942, to Edward F. Zap; and in the sum of $36,500, dated August 12, 1942; and August 17, 1942, in the sum of $3,665; and on August 17, 1942, the same amount—maybe that is a duplication; and on September 30, 1942, in the sum of $1,040, to Edward F. Zap; and November 17, 1942. There are two different accounting officers mentioned, Ensign Minor and Ensign Hershberger, and for that reason, and others I have given, I would prefer not to make a positive statement until those documents could be checked by the officer detailed that is the authority on that subject.

LUCIEN SMITH MINOR,

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Binns;

I am Lieutenant, junior grade, United States Naval Reserve, assigned as Assistant Cost Inspector, Douglas Aircraft Company, El Segundo. I have had that assignment approximately six weeks. Prior to that I was acting cost [61] Inspector at Douglas, with additional duty as acting cost Inspector over the contracts with E. F. Zap. I went on duty as acting cost Inspector, I believe it was February 1, 1942. I am familiar with the contract that Zap had with the Navy in February, 1942. The one contract over which our office had cognizance from a cost standpoint was NOs 83142. NOs, I believe, designates the Bureau which issued the contract.

The Clerk: That will be Government's Exhibit 3, for identification.

(The document referred to was marked Government's Exhibit No. 3, for identification.)

Mr. Binns: The first instrument is dated 18 March, 1943, and is entitled "Copy of Contract NOs 83142 dated 22 March 1941 and supplementary dated 13 December 1941." This first group, your Honor, contains the contract and one of its supplementaries. And the supplement is dated the 13th of December, 1941. The next group of documents,

(Testimony of Lucien Smith Minor.)

totaling 31 pages, fastened together with a blue ribbon and sealed with the seal of the Navy Department, designated as "1 April 1943"—these constitute letters between the Navy Department and E. F. Zap which in some manner vary the terms of the original contract. The next group of documents, constituting seven sheets, fastened together with a blue ribbon and sealed with the seal of the Navy Department, purports to be true copies of records in connection with contract NOs 83142. [62]

Mr. Lavine: In connection with that last offer, your Honor, there is one page in there that is not photostated. There is one page that is not photostated, apparently. It doesn't appear to me to be. It is on white and black, instead of black and white. However, I would like the record to show that the files of Mr. Zap were turned over to us in court here, we have a copy of the contractor's contract, and since it has been turned over to us—it was taken by the Government at the time of their taking of all of the files and records, and our file does not show that page. We would like to offer the file of the contractor showing the contract and all the documents that he had, as received by the Government, so that there cannot be any question about what we have got.

Mr. Binns: If your Honor please, we have no objection to Mr. Lavine offering whatever copy of the contract he has at the proper time.

The Court: He hasn't a copy; his is the original.

(Testimony of Lucien Smith Minor.)

Q. By Mr. Binns: Lieutenant, I show you Government's Exhibit 3, for identification, and ask you, is that a copy of the contract NOs 83142 that you have just referred to? A. Yes.

Q. And the other documents in that group, are they copies of supplemental letters in connection with that contract?

A. Yes, I would say all of the documents relate in [63] some manner to the original contract.

Mr. Binns: I offer Government's Exhibit No. 3 for identification in evidence at this time.

Mr. Lavine: You can offer it in evidence as far as I am concerned.

The Court: In evidence.

The Clerk: Government's Exhibit 3, admitted into evidence.

(The document referred to was marked Government's Exhibit No. 3, and was received in evidence.)

Mr. Binns: I desire to read one small portion of the contract at this point, and one of the supplemental papers at this time, your Honor.

The Court: Proceed.

Mr. Binns: "E. F. Zap, January 29, 1942.

"Restricted

To: Resident Inspector of Naval Aircraft, U.S.N., Douglas Aircraft Company, Inc., El Segundo, California.

Subject: Contract 83142 — Flight Test on OS2U-1 Airplane Zap Folding Wing Version—Quotation on.

(Testimony of Lucien Smith Minor.)

Reference:

(a) Specification SE-38C

Enclosure:

(A) Zap Report No. 135—Proposed Preliminary [64] Flight Demonstration Schedule.

1. Since no provisions for preliminary flight demonstration were included in subject contract and since the project is entering the final stages of completion, the contractor has taken the liberty to investigate the possibilities of conducting the flight tests on the subject airplane and respectfully submits herewith a quotation covering the cost breakdown based upon the program outlined in Enclosure (A).

a. Chief Test Pilot's Fee & Insurance	$ 4,000.00
b. Flight Engineer Fee & Insurance	650.00
c. Ground Crew	900.00
d. Special Equipment Rental	320.00
e. Gasoline and Oil	180.00
f. Flight Engineering — Reports Evaluation	2,900.00
g. Crash Insurance	4,200.00
h. Ground Coverage Insurance 30 days	580.00
i. Public Liability and Property Damage Insurance	180.00
	$13,910.00

(Testimony of Lucien Smith Minor.)

j. Contractor's Fee at 6%	834.00
Total Cost	$14,744.00

2. Tests outlined in Enclosure (A) will involve approximately 15-20 flight testing hours in Los Angeles area.

3. In accordance with Reference (a) Paragraphs B-6, [64-a] the Contractor herewith proposes to employ Mr. Wm. H. McAvoy as chief test pilot to conduct the tests outlined in Enclosure (A). Mr. McAvoy's long experience with the N.A.C.A. makes him particularly suited for this demonstration. In addition the contractor proposes to employ Mr. Harold E. Dale as flight engineer. Mr. Dale's position as assistant chief engineer for this contractor qualifies him to direct the demonstrations outlined in Enclosure (A) and makes observations useful to the Bureau. It is the contractor's intention to make additional flights to determine results of various aileron-vane settings, tuft tests for observation of flow characteristics, take-off and climb tests involving various flap positions, and minor aerodynamic investigations and adjustments to enable the contractor to submit the subject airplane for final demonstration in its most advantageous condition. For this reason it is highly desirable to have a flight after the first pilot's familiarization flight.

EDWARD F. ZAP".

(Testimony of Lucien Smith Minor.)

"Restricted
C-83142

(C-19) A-5 1st Endorsement January 30, 1942
From: Resident Inspector of Naval Aircraft,
El Segundo, Calif. [64-b]

To: The Chief of the Bureau of Aeronautics.
Subject: Contract 83142 Flight Test on OS2U-1 Airplane Zap Folding Wing Version Quotation on.
(E. F. Zap, Los Angeles, Calif. letter Z-422 dated January 29, 1942).

1. Forwarded for the Bureau's consideration and action.

2. Based on past experience, it is the Inspector's opinion that the contractor has underestimated the costs to be incurred in connection with engineering, reports and ground crew for conducting the flight test of subject airplane. Consequently the prices quoted are considered reasonable.

L. V. SCOTT"

(Testimony of Lucien Smith Minor.)

And another letter,

"Navy Department
Bureau of Supplies and Accounts
Washington, D. C.

Restricted Nos-83142 SPH6

29 June 1942

Mr. E. F. Zap
1005 Broxton Avenue
Los Angeles, California

Via: The Resident Inspector of Naval Aircraft,
El Secundo, California

Subject: Contract No. 83142, Schedule 500-2518—Zap Folding Wing—Flight Tests [64-c]

Reference: Your letter Z-422-HD:1h of 29 January 1942

Sir:

Contract NOs-83142 is hereby modified to provide for flight tests on OS2U-2 airplane Zap folding wing version in accordance with the reference and the schedules report enclosed therewith. The total estimated cost of this work authorized by this change is determined to be $13,910.00. The fixed fee payable in accordance with the terms of the contract is $834.60.

Payment will be made for the work (labor, material, etc.) involved in this change at cost determined in accordance with the terms of the contract plus a fixed fee of $834.60.

(Testimony of Lucien Smith Minor.)

The above increase will be chargeable to the appropriation 1741502. (4) Aviation Navy 1942, Subhead VIII.

Observation landplane——"

The rest of the paragraph contains certain technical data.

"Respectfully

M. A. NORCROSS

Purchasing Officer

Bureau of Supplies and Accounts"

Q. By Mr. Binns: Now, then, Lieutenant, during your [64-d] tour of duty in connection with the Zap plant, was any other contract entered into with the United States Navy?

A. Yes. Contract NXs 4105 was executed, I would say, in May or June of 1942. There was a letter of intent, however, outstanding on that contract several months previously.

Mr. Binns: May these two documents, the first designated as "Copy of Confidential Contract NX3 4105 dated 15 May 1942," and the second group designated "Papers are true copies of records in connection with contract NXs 4105," be marked as the Government's next in order, for identification?

The Clerk: That will be Government's Exhibit 4, for identification.

(The document referred to was marked Government's Exhibit 4, for identification.)

Mr. Lavine: I didn't hear the last answer of the witness; something about letter of intent.

(Testimony of Lucien Smith Minor.)

The Court: Will you read it, please, Mr. Reporter?

(Answer read.) [64-e]

By the Witness: In contract 83142, the fixed cost item, the contract provides that the contractor will receive a fixed sum for doing the job, irrespective of what his costs are; whereas, in the cost of a cost plus a fixed fee item, the contract provides that the contractor will be paid cost, as determined by the Bureau of Supplies and Accounts, plus a stipulated fee.

They phrase "Estimated cost" is an estimate agreed upon between the Bureau and the contractor as to approximately what it will cost to produce the contract, and the fixed fee is based on this estimate. If is a percentage of the estimate. The fee, however, will be definitely determined and will not increase. If the actual cost was less than the estimate, on these particular contracts, the contractor would get his actual cost, plus the fee originally agreed upon. If the actual cost was larger than the estimate, if considered justifiable, he would get the actual cost, plus the original fee stipulated.

Under contract 83142 Mr. Zap would secure reimbursement for fixed cost items. Mr. Zap would, I believe, be required to prepare an invoice, itemizing the particular item in question, stating that the job had been completed, and forward that claim to the Bureau of Supplies and Accounts in Washington, via the Inspector of Naval Aircraft; the inspector

(Testimony of Lucien Smith Minor.)

would endorse the invoice or the letter, as the case may be, indicating therein if the contractor's claim as to the [65] completion and the acceptability of the item was correct; and on the basis of the inspector's endorsement the Bureau would issue a check in payment of the item. That particular voucher would not go through my office. Not under normal conditions. Under contract 83142 Mr. Zap would secure reimbursement under a cost plus a fixed fee item.

As he accumulated costs according to the particular contract, he would notify the cost inspector and request that the charges be audited and approved and the necessary vouchers prepared. After our office had conducted a preliminary audit and reviewed the items, the voucher would then be prepared, forwarded to Mr. Zap for his signature, then after being signed by the cost inspector would be forwarded to the disbursing officer in San Diego, who would prepare the check. The inspector I mean is the Inspector of Naval Aircraft. The documents underlying the voucher would generally be approved by the resident inspector.

At the time I reported for duty I believe Mr. J. W. Combes was handling the contract. He was subsequently transferred to other work. Mr. Hilton Byers took his place. Assisting Mr. Byers were Mr. T. A. Balzer and J. C. Watkins. Mr. Byers would not spend his full time at the Zap Company, and Mr. Balzer would not spend his full time at the Zap

(Testimony of Lucien Smith Minor.)

Company. None of the other gentlemen spent their full time at the Zap Company.

Mr. Combes, Mr. Balzer, Mr. Byers and myself are not [66] individual engineers. In performing our duties, we depended for engineering knowledge upon the resident inspector or his delegated representative. The resident inspector upon whom we depended was Lieutenant Commander Scott.

In the case of purchases of material for the contract he would approve the purchase as being necessary for the performance of the contract. He would also approve the material as being satisfactory in quality; he or his representative. He would certify to the arrival of the material that it was received.

Q. By Mr. Binns: Can you tell us what Lieutenant Commander Scott's duty was in connection with other items besides material?

In Contract NXs 4105, there was a difference in that contract in the way that Mr. Zap would secure reimbursement for fixed price items.

I believe that contract provided, in the case of one item on there, I think, for partial payments. In other words, on a fixed price item he did not have to wait until he had completed the item before he could obtain payment. I think the contract stated that when the work was 90 per cent completed he could obtain 80 per cent of the cost. [67] The resident inspector of Naval Aircraft would determine when it was 90 per cent completed.

Directing my attention to the cost-plus portion of

(Testimony of Lucien Smith-Minor.)

NXs 4105, the securing of reimbursement under that portion of the contract, the securing of the final reimbursement, did not differ in any way from what I have told you applied to contract 83142. There was, however, an advance fund, an advance payment account provided for that particular contract, from which the contractor could obtain temporary payment for cost incurred in connection with the contract. It was operating on a revolving or impressed fund basis.

The terms of the contract provided that the contractor could make withdrawals from that fund to cover costs which actually had been incurred directly in connection with the particular contract and which either had been paid or would be paid for shortly. So in order for Mr. Zap to obtain reimbursement the procedure he followed was to prepare a certification indicating the total amounts of expenses which he had incurred in connection with the contract, and forward that certificate, along with a letter requesting permission to withdraw the amount indicated on the certificate from the fund, to the Inspector of Naval Aircraft, via the cost inspector. The cost inspector's office made a very preliminary review of these charges; not an audit or a detailed audit at all, because the contract provided that he could even withdraw before he had actually paid the item himself, so it was a [68] very cursory review. If found to be generally in order, his certificate was forwarded to the Inspector of Naval Air-

(Testimony of Lucien Smith Minor.)

craft, with a recommendation that his check be countersigned and Mr. Zap be permitted to withdraw the funds from the account.

Q. Now, then, in order to replenish the revolving fund, what procedure would Mr. Zap go through?

A. Well, after he had actually paid the items, or in the case of accruals substantiated the fact that they were proper accruals, items charged to the contract, the cost inspector's office would then make an examination of the items, and if on the basis of that examination they seemed to be in order, a public voucher was prepared in payment of those items. The public voucher would then be routed to Mr. Zap for his signature, to the inspector for his, and the signature of the cost inspector, and forwarded to the disbursing officer for payment, who would draw a check in favor of Mr. Zap, indicating on the check that it was for deposit only in this advanced payment account. Mr. Zap always used the revolving fund in securing reimbursement for cost plus items under 4105, after its establishment. Before the revolving fund was established he would have to have a public voucher prepared in the same manner as I just outlined, after we had audited the items. Then that voucher would be passed to him without any restriction; he could use it as he saw fit.

Regarding an audit of a cost-plus item of a contractor's [69] contract—it would be best to segregate the cost in the general classifications. There would be direct labor, direct material, other direct charges, and overhead expense.

(Testimony of Lucien Smith Minor.)

In the case of a direct material purchase charged to the contract, the first step in the audit would be to ascertain that a purchase order had been issued for the particular material in question; that this purchase order had been approved as to price, necessity for the material, and so forth, by the resident inspector of Naval Aircraft or his representative. The next step would be to compare the vendor's invoice with the purchase order to determine that the terms indicated on the invoice, the prices and so forth, were in agreement with that stipulated in the contract, or, rather, the purchase order. Then the quantity indicated on the invoice would be compared with the receiving report, which was evidence that the material had been received. That receiving report would be reviewed to determine whether it had been approved by the resident inspector as to the quality of the material and to the quantity. Then the extensions of the vendor's invoice would be checked to verify the charge. On the test check basis examinations would be made of the cancelled checks payable to the vendor to ascertain that the liability accounts had been paid as evidenced by the vendor's endorsement and the cancelled check.

On the next classification—direct labor. The audit there would consist principally of ascertaining that the [70] charges entered to a particular contract or section of a contract for labor were in agreement with the allocation of time as set forth on the contractor's basic or original time records, or the time

(Testimony of Lucien Smith Minor.)

cards in this case; that the extensions to contracts were correct; that the hours at which the time was extended were the approved rates; and, lastly, that the amounts entered in the payroll records as having been paid to a particular employee actually were paid to that individual. You determine that point by occasional witness of payoff, identify the individual, and by examination of cancelled checks endorsed by the payee. Other direct charges would be in a manner practically identical with direct material.

All items charged to overhead expense, or, I would say, practically all items would be reviewed to determine their allowability as an element of cost under the provisions of the contract, and under the provisions of Treasury Decision 5000, there being certain types of items not allowable. After determining that the item was a proper charge; that is as to its nature, it would be checked back to a purchase order, in the event it was supplies, if it was an item of that nature charged to overhead expense, to determine prices; the extension on the item would be checked; the cancelled checks would be examined, on a test basis, to determine if the liability had been paid; accruals, and so forth, would be examined as to their propriety; labor would be traced to the payroll records. I think that is all. [71]

Instead of making a detailed audit of every transaction on items of a similar nature, we would select just a percentage of them for detailed check. As-

(Testimony of Lucien Smith Minor.)

suming that we found those in order, or reasonably so, with very few errors, it would be satisfactory to accept the total on the basis of an examination of the percentage of the total. We felt that we could determine whether liabilities recorded on the books could have been satisfactorily paid without making a 100 per cent examination of the cancelled checks.

A receiving report is a report prepared by the contractor indicating certain materials have been received from the vendor. It would indicate, I believe, in the case of Mr. Zap's records, the purchase order number, the contract, and so forth. It indicates the quantity received and the date on which received. We relied on the resident inspector's representative's signature as to quantity and so forth. [72]

WILLIAM HENRY McAVOY

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Miss Arbuthnot:

My address is Marvin Avenue, Los Altos, California. I am head test pilot for the National Advisory Committee on Aeronautics, at Moffett Field. I have been in the flight test section of the National Advisory Committee since 1925. That's when I

(Testimony of William Henry McAvoy.)

started my flight work with them as test pilot. I have flown as a test pilot approximately 6,000 hours. To date, we have, or, rather, I have flown practically all types of Army and Navy airplanes, seaplanes, land planes, and autogiros. Practically all the work that we do in the Committee for which I have been flying for the last 15 or 17 years has been on actual flight tests.

Our particular line of work is naturally connected with the services, either doing it for the Army or the Navy. Our particular work is to calibrate, as it were, the flying qualities of an airplane for the services, find out any peculiar characteristics it might have, possibly improve on them by suggestion, if we have any, and in general what we intend to do is to try to improve the flight qualities of the service airplane.

I was employed by Mr. Zap to test a Vought-Sikorski airplane with a special wing device. I conducted this test [73] flight. The tests originally started being flown from Hughes Field in Los Angeles, and were later carried out at Daggett, and completed, finally, back at Hughes Field. I had a conversation with Mr. Zap in connection with the performance of the plane. Of course we, what you might say, conferred daily on the various difficulties or things that we were learning about the airplane, and we also discussed in particular the particular parts of the airplane which we were interested in. In my estimation there were two things on that par-

(Testimony of William Henry McAvoy.)

ticular airplane which we were endeavoring to get the particulars on. One was the flap, and the other was the spoiler type aileron. I had a conversation with Mr. Zap in connection with this flap and the spoiler aileron.

Toward the end of the test when we were endeavoring to complete the Navy requirements which apply to airplanes of that nature, I had occasion to bring up the matter of possible difficulty in getting the full performance out of the airplane. These conversations were not held at any particular time. They were carried out or discussed during the flights, daily flights. This particular instance I have in mind in which I think the subject came more to the point was during the period that we were actually carrying ut the Navy's specified tests. Now the exact date of that I would say was possibly after we had been at Daggett some six to eight days. That would place the time somewhere around the first of October. [74]

These conversations occurred usually when we were together in the small portable or mobile office which Mr. Zap had there at the time—it was a trailer which had been converted into a little engineering office—and at most times after a flight or after these particular flights when we realized that we were not able to do the complete Navy requirements on this particular ship. I couldn't say definitely who was there, but more than likely Harold Dale, and possibly one or two of the engineers.

(Testimony of William Henry McAvoy.)

Well, I can give my general interpretation of the conversation from my standpoint. I was concerned chiefly with the fact that we were having difficulty in the inverted flight condition. I had tried to slow roll the airplane and had not gotten very good results. I had also tried some snap rolls and had not gotten very good results from them, and I was concerned mainly with this particular control as applied to the airplane I was flying. I had understood from Mr. Zap that he had planned to use that on a later job that he was to do for the Navy, and in that I had tentatively been told that I might be secured to do that work, I was naturally interested in what I was getting out of the present airplane, and it was not performing as I would like to have had it do.

Prior to the time I went to Daggett Field I did have a conversation with Mr. Zap. Of course, we discussed a number [75] of things practically every day in the office while we were waiting for the weather to clear around Los Angeles.

Well, I did have one occasion to talk to Mr. Zap personally about something that he asked me to do for him. To the best of my recollection it was one or two days before we took the airplane to Daggett. It was in his office; or rather, not in his personal office; it was in the outer office, the main office. I don't recall that anyone was actually right close at hand, but it was during working hours and as far as I know the office, or, rather, the complete person-

(Testimony of William Henry McAvoy.)

nel was around and about the office at that time. But there was no one close to me and Mr. Zap at the time it occurred. No one else participated in that. It occurred, I believe, in the morning. I was sitting in the outer part of the office, the entry, as it were, reading. Mr. Zap came up to me and had a paper in his hand and said something to the effect that "Mac, will you sign this check?"

I looked up and he had this check, held before me. I took it in my hand and looked at it. It turned out to be a company check on the Zap Corporation, and it was completely blank. At the particular time it had the small stub attachment or the stub attachment that usually accompanies a business type check.

On finding there was nothing on it I sort of hesitated for a moment, and possibly made some remark offhand, and in the meantime he interrupted and said to this effect, that [76] "Well, this check is going to be used for drawing some money which will cover the general expenses of the trip to Daggett in which you and Harold Dale," and several others whom I don't remember, "are involved." And he said, "I want to get you to endorse it and I am going to have Harold Dale endorse it," and I believe he mentioned one other, but I don't remember the name; but I do definitely recall that he mentioned Harold Dale's name.

I took the check and endorsed it on the back. At that time the check was completely blank except for

(Testimony of William Henry McAvoy.)

my endorsement on the back of it. I did not subsequently receive that same check from Mr. Zap. And at the time, I might add, I did not know for what sum of money Mr. Zap was making that check out. I don't think that was even mentioned to me at the time.

I received two payments from Mr. Zap, one of $300 cash, for which I gave him a receipt; and another payment of $2,075 on his personal check, I assumed, of which at the time I received it I wrote out a hand-written receipt as having received in full payment for the test. These payments were made in accordance with the agreement I had with Mr. Zap.

(The document referred to was marked Government's Exhibit 5, for identification.)

Government's exhibit 5, for identification was shown the witness.

I have seen this before. It is my signature. This is [77] a typewritten receipt. Typewritten, for the sum of $300, which I countersigned as having received from Mr. Zap in payment for excess flight time in testing the OS2U2 airplane.

The Clerk: Government's Exhibit 5 admitted into evidence.

The Witness: I have seen this document before. It is my signature and handwriting. This is a handwriften receipt, by me, in which I state I have been paid in full for my services in flight testing the Navy OS2U2 airplane.

(Testimony of William Henry McAvoy.)

Miss Arbuthnot: I offer it in evidence as Government's Exhibit next in order.

Mr. Lavine: No objection.

The Court: Any amount stated there?

Q. By Miss Arbuthnot: Is any amount stated?

A. No amount stated.

The Clerk: Government's Exhibit 6 in evidence.

(The document referred to was marked Government's Exhibit 6 and was received in evidence.)

The Clerk: That is dated October 11, 1942, your Honor.

Miss Arbuthnot: I would like the record to show that I am now reading Government's Exhibits 5 and 6 to the jury. Government's Exhibit 5, on the letterhead of E. F. Zap Aeronautical Engineers, dated October 6, 1942.

"Received of Edward F. Zap the sum of Three hundred ($300) dollars for excess time in flight testing the OS2U airplane at Daggett Field to October 6, 1942."

Signed "William H. McAvoy." [78]

Government's Exhibit No. 6, also on the letterhead of E. F. Zap Aeronautical Engineers, in the handwriting of Mr. McAvoy, dated October 11, 1942, Los Angeles, California.

"E. F. Zap Corporation

I herewith acknowledge final payment in full covering my services in flight testing the Navy

(Testimony of William Henry McAvoy.)

OS2U airplane on Navy contract No. 83142." Signed "William H. McAvoy."

I did not receive any payments in addition to the payments evidenced by these receipts from Mr. Zap or from anyone else in connection with this flight test. To the best of my recollection I have not received anything else but these two.

Cross Examination

By Mr. Lavine:

The first flight test arrangements that I made, I made on the telephone with Mr. Zap, by long distance 'phone.

Mr. Lavine: By the way, your Honor, we are taking this a little bit out of order. I would like to read to the jury at this time from one of the exhibits presented by the Government yesterday: contract 83142; just one sentence out of the contract at this time.

Mr. Lavine (Reading):

"Subject: Contract 83142. Flight test on OS2U1 airplane, Zap folding wing version. Quotations on: (reference A.) Specification SR 38-C. Enclosure A Zap Report No. 135, [79] proposed preliminary flight test demonstration schedule.

1. Since no provisions for preliminary flight test demonstrations were included in subject contract and since the project is entering the final stages of completion, the contractor has

(Testimony of William Henry McAvoy.)

taken the liberty to investigate the possibilities of conducting the flight test on the subject airplane and respectfully submits herewith a quotation covering the cost breakdown based upon the program outlined in enclosure A.

A. Chief test pilot's fee and insurance, $4,000."

The Witness Continues: I was insured at all times during this flight. If I may refer back to a previous job with Mr. Zap the year before I carried that insurance myself, and paid for it. This particular time, it amounted to considerably more, and Mr. Zap kindly said that he would take care of it.

All of the tests were originally planned to be run at Hughes Field, if that is the place you are speaking of, and due to the weather we could not proceed and we had to change our location. We started the flight tests at Hughes Field, and included in my arrangements with Mr. Zap, and as a customary procedure, I was to be paid my traveling expenses down here. And Mr. Zap took care of those, that is right. I was also to be paid my expenses back — all additional expenses involved. [80]

My home is in Los Altos, and my place of business at Moffett Field. I came by airplane. I think in every instance that I came down I flew down, and flew back. And in addition to my expenses for the trip, the pilot's fees also include all living expenses while here. Mr. Zap took care of all those.

(Testimony of William Henry McAvoy.)

That was over and above the $2,000 which I originally planned on—originally stated in my contract with him. That was not included in any check that I received. In other words, Mr. Zap paid those additionally to anything that I received myself. No itemized statement that I know of has ever been made on that, as far as I am concerned; but they were all taken care of. In addition to the pilot's fee, the one pilot's fee, I was supposed to have a co-pilot, somebody who was to assist on that occasion. I never had much to do with that. There was a more or less tentative arrangement, as far as I was concerned, in which Mr. Zap's chief engineer, Mr. Harold Dale, would fly with me whenever necessary to take data. There wasn't a tentative arrangement for someone else to go on the trip that I know of. That might have been Mr. Zap's plan, I don't know, but to the best of my recollection Mr. Dale was the only one that I had any connection with until Mr. Zap actually flew with me himself.

After I flew at Hughes Field a heavy fog came up and the conditions here were quite foggy, and so I had to go to Daggett, which is about a hundred miles away. It is at least [81] that, if not further than that. I went up there and all my expenses up there were taken care of. In addition to my expenses up there, my expenses going to Daggett were taken care of. I flew in the Navy Airplane.

Mr. L. Clousing was originally brought into this entirely aside from my business arrangement with

(Testimony of William Henry McAvoy.)

the flying of this airplane. My understanding of that is this. Now this may not check entirely with Mr. Zap, because he was perfectly free to make other arrangement with Mr. Clousing. I had said as far as I was concerned I was willing to have Mr. Clousing come down and fly the airplane while I was flying it. If he had done that more than likely he would have been paid for it. I am not sure, but I would assume that to be the case. It so worked out that Mr. Clousing did not come down, quite a bit to his disappointment, because I am in direct contact with him, and the reason for that was, in my estimation, due to the time that it took to do our work and the requirements of trying to get the ship back into the Navy.

It is perfectly possible that if our flights had not taken so long that Mr. Clousing would have come down and flown the airplane, but as far as I am concerned I had nothing to do with that. That didn't come out of my business agreement at all. I went up to Daggett to test this plane. I think the testing ran on the order of probably 10 to 15 days, referring to my flight log here. [82]

We flew to Daggett on September 25th, and returned on the 4th or 5th of October. We were there about ten days, according to this. I made at least two to five flights a day. Some days we made more. After I made the flights and during the time I was making the flights I was consulting with and discussing the various problems with Mr. Zap and Mr. Dale.

(Testimony of William Henry McAvoy.)

These flight tests take hazards. They are on new problems in aeronautics. When you are dealing with any new airplane and particularly on a chain of flight tests, you take a certain amount of hazard. Mr. Zap made 16 flights with me while we were at Daggett. During these flights the discussions back and forth, (during the flight itself), were not very satisfactory. Our voice control was not so good on that particular setup. Usually after we came down, I and Mr. Zap and Mr. Dale would get into a big huddle, and discuss all the problems in connection with the flight, usually pertaining to that particular flight; because, I might mention, when you are flight testing an airplane you only change one thing at a time, because if you change two things, then you don't get the dual effect of that particular thing you are interested in. So each flight we usually made making some change in the flight control, and then the results of that would be discussed upon returning to the ground.

Mr. Zap, in any event, was very busy, and so was I all the time we were up there.

Of course, I was just the pilot on the airplane and [83] trying to get the results out of it. Mr. Zap was the engineering head of it. I lent very little engineering to it, I might say. He and Mr. Dale were doing that. It is true that they were quite busy all the time trying to work out the engineering problems out there. All my expenses while I was actually

(Testimony of William Henry McAvoy.)

at Daggett were all taken care of by Mr. Zap. That included my hotel expenses and everything else.

Q. By Mr. Lavine: Mr. McAvoy, these checks that you received from Mr. Zap were paid to you right up there in the field, weren't they, if you recall? A. What checks are you speaking of?

Q. The checks for your services.

A. I only received one.

Q. You only received one?

A. That is right.

Q. And how much was that for?

A. $2,075.

Q. I ask you to look at this check for $200, dated October 4, 1942. Did you receive that one?

A. That's got my signature on it. Apparently I did.

Q. So that in addition to the other check, you received, on October 4, 1942, $200?

A. That is right. That is my signature.

Q. And that check is a personal check on the Bank of America, signed "Edward F. Zap," is it not? A. Yes, sir. [84]

Mr. Lavine: I offer this check as Defendants' next in order.

The Clerk: That will be Defendants' D, into evidence; or, rather, Defendants' C.

(The check referred to was marked as Defendants' Exhibit C, and was received in evidence.)

(Testimony of William Henry McAvoy.)

The Witness: May I ask what was the date of that?

Mr. Lavine: October 4, 1942. It is about the time you finished your flights, wasn't it? The 4th or 5th of October.

The Witness: Yes, sir.

The Court: He returned October 4th.

The Witness: Yes, sir.

The Court. Now, that is two items, and then there was another item you received, wasn't there, from Mr. Zap in cash?

The Witness: Well, my statements to date have been concerned with two items. I stated that the first sum, which was $300, was a cash payment. And the other was $2,075, by check, and in this particular instance $200. That is $200, and that was by check. I do not remember any other amounts, but I acknowledge my signature. Yes, sir, that is my signature.

The Court: Endorsement, rather. All right.

The Witness: I remember motion pictures being taken of the flights while they were being made. My log does not show the [85] distance between here and Daggett. The same is given of the flight. "Takeoff at 3:50. Landing at 5:28." We went a very roundabout flight. That is a total time of an hour and 30 minutes. If that flight had been made direct we would probably have made it in about an hour and ten minutes. That would make it pretty close to 160 miles. The day I went, Mr. Dale went

(Testimony of William Henry McAvoy.)

with me that day. In the early part of the flights Mr. Zap was taking motion pictures of the flight, or having them taken. And then afterwards, as the flight tests proceeded from day to day, Mr. Zap joined me in the flights and went up; and a log is made of each of those flights here. Up to October 8th, 9th and 10th this is a correct log. It satisfies me that it would be a fairly good log of the entire procedure. I have reason to want to keep this, or get this back, because that was drawn from the files of the N.A.C.A. to bring down here. We are using that in further work on the airplane.

Q. By Mr. Lavine: Mr. McAvoy, will you kindly look at this document of the flight log of that trip and examine it and see if it is a true and correct copy of the experiences you had there, adding to your report various engineering data?

A. No. Now, this isn't the same page.

Q. Well, "The airplane was made realy." This is page 1-A. "The airplane was made ready——"

A. "6:20."

Q. "6:20 p. m." [86]

A. Apparently these are different copies.

Mr. Lavine. Well, the only thing I wanted you to do was identify this document as substantially representing the log of your various trips up there, so that I can introduce that in evidence on behalf of the defendant; and if that represents it, it doesn't have to compare with yours, if that is a true and accurate representation of the flight.

(Testimony of William Henry McAvoy.)

A. This shows a total of 54 flights, which checks with mine. I have 54 flights in mine. Apparently the location was the same for each of the flights corresponding.

The Clerk: Defendants' Exhibit D.

(The parts of the document referred to were marked Defendants' Exhibit D, and received in evidence.)

The Witness: This is a photograph of the plane that I flew. This is another photograph of the right rear of the plane that I flew in flight tests. (Identifying photograph.)

That is a picture of the same ship with the wings folded. (Identifying photograph.)

This is a picture of the same ship, the rear left, with the wings folded. (Identifying photograph.)

That is a picture of the same ship with the ailerons extended. (Identifying photograph.)

That is a picture of the three-quarter front right with the flap fully extended. (Identifying photograph.)

That is another picture of the ship, with the quarter left front, left flap extended. (Identifying photograph.) [87]

That is a copy of the spin chute installation of the ship. (Identifying photograph.)

That is a picture of a ship with the flap extended out landing or taking off.

That is a picture of a ship with the tail strike wheels striking the ground.

(Testimony of William Henry McAvoy.)

The Clerk: Defendants' Exhibit E in evidence.

(The pictures referred to were marked as Defendants' Exhibit E, and were received in evidence.)

The Witness: The object of this flap is to slow down the airplane in landing and taking off, and that flap is in the wing and then it extends out from the wing as you fly. In this particular instance it did.

This document of October 11th, this is all written in my own handwriting. I wrote the entire document, October 11th, Los Angeles, California. "I herewith acknowledge final payment in full in connection with my services in flight test as to Navy OS2 airplane on Navy contract No. 83412," and I scratched that out and wrote 83142—William H. McAvoy.

In connection with that flight test which was to be conducted with that plane, there was some additional test made on the 8th, 9th and 10. I mention the 8th, 9th and 10th, they may not be the exact dates, but to the best of my recollection I came back and made several flights, either the following week end or several days after that, about [88] that particular date. I made another trip back from the northern part of the state, and my expenses coming back here and going back were all taken care of by Mr. Zap. And my expenses while I was here during the 8th, 9th and 10th, were taken care

(Testimony of William Henry McAvoy.)

of by Mr. Zap. I am not sure I was here that long, but while I was here, they were covered.

I don't remember that Mr. Zap flew with me on the 8th, 9th or 10th, but he was there at the field while we were making the flights; he may have gone with me, but I don't remember. After I got through with those tests, and the tests were made, Mr. Zap was there, checking the engineering data. I presume he was pretty busy working, mainly in regards to the ship, or the enginering, or consulting with the men as to what was to be done next. I was not with him every minute, you understand. After a flight I would usually relax a little bit or go around and get a drink, or something like that. Sometimes I would be with him when they called me, and other times I would just step aside, as it were. Everybody seemed quite busy around there at the time, including myself. There was quite a bit of work.

Now, after the last test that I made the plane was flown to Anacosta by a Navy pilot, so far as I know. And incidentally during these periods of time I was discussing the flight tests and the matter of arranging for the test, and Mr. Zap went up to see me once with his engineer, in Oakland. He came up in relation to this particular series [89] of tests at least once, if not twice, to my home town, and in one instance, stayed with me overnight. Mr. Dale was with him on one visit.

I don't recall exact circumstances or who was around when I received the $200 check. In fact, I

(Testimony of William Henry McAvoy.)

am trying to check up on that in my mind. I cannot quite trail it back. On October 4th we just had gotten back from Daggett I believe—10-4—I think that then, that particular day, we were flying out to Hughes Field, as far as I can check here. My record here shows we returned from Daggett Field to Hughes Airport on the 4th of October, which was apparently the date that check was given.

The Court: The date evidently is approximately correct on this exhibit, Mr. Lavine, on the $200 check, because I notice there is one banking endorsement of October 7th, which was three days after; there is another bank endorsement, which is poorly stamped by the bank, and it is impossible to make it out.

By the Witness: Inspector Hartman, a naval inspector, was at Daggett the entire time.

Mr. Lavine: That is all. Thank you.

Cross Examination

By Mr. Balter:

Miss Arbuthnot: We would like to ask the Court's permission to reopen and ask a few direct questions.

The Court: Granted. [90]

Direct Examination
(Resumed)

By Miss Arbuthnot:

Q. Mr. McAvoy, I show you Government's Exhibit 7 for identification. Have you seen this before? A. Yes, I have.

(Testimony of William Henry McAvoy.)

Q. Is this your signature?

A. That is my signature.

Q. Thank you. Will you tell us whether this check is the one you endorsed at the time you had the conversation with Mr. Zap, concerning the——

A. That is the check which I described before which Mr. Zap brought to me blank, and which he had me endorse on the back with my name.

Miss Arbuthnot: The Government offers this in evidence as the Government's next exhibit in order.

The Court: Received in evidence.

(The check heretofore marked for identification as Government's Exhibit No. 7, was received in evidence.)

The Clerk: Government's Exhibit 7 admitted into evidence.

Miss Arbuthnot: Now, I would like the record to show that the Government's Exhibit 7 is being passed to the jury for examination.

(Government Exhibit 7 shown to and examined by the jury.)

Miss Arbuthnot: That is all. [91]

Cross Examination

By Mr. Lavine:

I was not present when any of the typing was done on this check. I, therefore, have no knowledge of who typed this check, or any of the amounts on there. I haven't any idea at all. I was not present when this check was signed. I only saw the check

(Testimony of William Henry McAvoy.)

once for about five minutes, and that was during the time I signed my name on the back of the blank check—no, sir; on the front of the check.

The date I signed this check—I have estimated that it was a day or two days before we went to Daggett, and that would make it around about the 23rd, or something of that order, September 23rd, when I signed it on the back. I, of course, have not the slightest knowledge of the date that this check cleared.

The Court: What is the amount of the check, Mr. Lavine?

Mr. Lavine: The check is for $4,000 made out—in the amount of $4,000, made out on the typewriter.

The Court: What date?

Mr. Lavine: Dated September 23, 1942, made out on the heading of E. F. Zap Aeronautical Engineers, No. 2679. Now, the check appears to be marked "Paid 10-13-42." In other words, there is a bank stamp of having been paid "10-13-42," and it bears a stamp on the back "Security-First National Bank of Los Angeles," and a stamped endorsement "Edward F. Zap—E. F. Zap," under the name "William H. McAvoy." [92]

The Court: Paid about 17 days after it was drawn?

Mr. Lavine: Yes, your Honor.

FRED S. EASTMAN,

called as a witness by and on behalf of the Government, having been duly sworn, was examined and testified as follows:

By Mr. Binns:

I live in Seattle, Washington; am employed by the University of Washington as Associate Professor of Aeronautical Engineering and Wind Tunnel Supervisor. As such, I control the policy of the laboratory and handle the records which go through from the billing and the job records that are done in the laboratory, maintenance of the laboratory, and that sort of thing.

My assistants are Mr. J. H. Dwinnell, and other faculty members. Mr. Dwinnell is assistant supervisor.

I know the defendant Zap; he was a customer of the University of Washington Wind Tunnel Laboratory; brought models up to the laboratory to be tested on numerous occasions.

This letter, Government's Exhibit 8 for identification, I have seen before; it is a record of the work done in the wind tunnel from the period of December, 1941, through July, 1942; it is dated August 25; addressed to E. F. Zap; E. F. Zap signed it.

(The document was admitted in evidence as Government's [93] Exhibit 8 and passed to the jury.)

The pencil notations on the margins of the document were not on it when I mailed the report.

(Testimony of Fred S. Eastman.)

The arrangements that are made to secure power for the wind tunnel are as follows:

The power is taken from the regular University supply and they have a separate line from that power supply to the wind tunnel; the University purchases all the power for its entire facilities and the wind tunnel draws from the entire University power system; there is no separate power for the wind tunnel from the power company. It has a separate line from the main section of the University. The payment for power goes through my office; that is, the charges go through my office for power used in the wind tunnel. The University comptroller's office pays for the entire power consumed by the University of Washington. When work is done at the wind tunnel for a customer, the customer is billed for the power which he used during those tests. He is billed by the Comptroller of the University and he pays the money to the Comptroller of the University.

The arrangement by which labor is performed in the wind tunnel for the customer is as follows:

The wind tunnel is run by students, partly through part time students and the part time work in the wind tunnel. These men turn in time slips, each day on which is noted the [93-a] job for which their time was spent, and those go through the office of Mr. Dwinnell. When these bills are made up, those time slips are gathered together and the bill is computed from those time slips and forwarded

(Testimony of Fred S. Eastman.)

through my office to Mr. Davis, the Comptroller's office and the bill is then rendered from the Comptroller's office to the customer. The students receive their compensation from the University of Washington; there is no authorized arrangement by which a person using the wind tunnel might pay student labor directly himself. The University has authorized the amount of work that the students performed on these tests, and an effort has been made to confine the arrangement for paying the students to be direct payment by the University. This arrangement was put into effect prior to December of 1941, and about the summertime of 1941.

This arrangement has been violated by customers; I don't know if it has been violated by Mr. Zap.

Cross Examination

By Mr. Lavine:

I believe it is probably true that Mr. Zap did violate this arrangement.

Mr. Zap used all of the time which he was allotted by the University, and as many students as he could get to work for him. These students gave him considerable time.

These periods of time which the University allotted him [93-b] ran for a period of from five to ten days; Mr. Zap was allowed the key to the place, so that he could work 24 hours a day if he wanted to. He often worked evenings; students also often worked evenings with him. Zap's employees also worked with him at the University wind tunnel.

(Testimony of Fred S. Eastman.)

Defendant's Exhibit F (later admitted into evidence) is one of our reports, based on Mr. Zap's work, dated June 16, 1942, entitled "University of Washington, Aeronautical Laboratory Report 154-B". It contains the results of the tests made by Mr. Zap in the wind tunnel at the University of Washington.

Several similar reports were compiled, namely reports 154-B, 173, 177, 178, 183, 188 and 190.

I have no way of knowing all the persons who might be present at night, or any of the things that were done, but I should be cognizant of the arrangement.

We billed Mr. Zap for power and machines but I couldn't testify as to the exact quantity. The amount billed for power and machine work appears on that bill. $12.50 "tunnel time" charge, is the charge for the use of the laboratory, laboratory equipment, laboratory maintenance and such things.

Mr. Zap has been coming to our laboratory for a matter of two or three years at least; and before he comes he makes arrangements for the use of the wind tunnel time. He has frequently been urgently in need of time and we have done [93-e] everything we could to fit things in for his time.

On March 25, 1943, a small error of $86.40 was found on the University accounts for power, out of an entire bill up in the $5,000 mark. This five thousand dollar bill was covering the entire period that is outlined in that other billing file.

(Testimony of Fred S. Eastman.)

When Mr. Zap was at the wind tunnel, it was being run to its fullest efficiency.

Power varies a great deal, depending upon the work being done. The wind tunnel will draw a tremendous amount at a very high speed and will not draw so much power at a slow speed, so it will vary from one day to another depending upon the—but the main power was being used to the tunnel's capacity by Mr. Zap.

Redirect Examination

By Mr. Binns:

The number of students required to operate the wind tunnel varies but we normally hold to approximately three students to operate the wind tunnel. We pay these students between sixty cents and one dollar per hour, depending upon the experience of the men and we practically never have three dollar men at one time. Unless it was authorized by us for special night jobs, we did not consider such night jobs part of a student's authorized thirty hours per month. [93-d]

The bills rendered include night time power also.

Q. In the letter, Government's Exhibit 8, which we have just introduced in evidence, in that letter did you identify the student labor which went on each report? A. Yes.

Q. Did you include in that any work you were cognizant of that the students had done at night.

A. Yes.

(Testimony of Fred S. Eastman.)

Recross Examination

By Mr. Lavine:

There may have been circumstances such that a lot of student work was done at night and no report was made to me; we hoped there wouldn't be much of this "black market" labor among the students; there may have been some instances of that kind. I don't know if Mr. Zap was employing some of these students and paying them privately. No record was made by us of students who might be paid privately by Mr. Zap for night work.

Referring to Exhibit 8, shop work was extra work than the work which is charged through this particular bill; the amount of the bill is $5,295.56, which shows the full amount received during that time, and the full amount that Mr. Zap owed the University for this work except a small overcharge error in the amount of $86.40.

On March 25, 1943, the Comptroller of the University [93-e] forwarded to Mr. Zap a credit memorandum to take care of that which read as follows:

"Mr. Edward Zap.

Dear Mr. Zap:

In checking over our last voucher No. 5 in the amount of $5,295.56, we discovered that a stenographic error was made in setting forth the charges in report No. 154-b. Power and tunnel machinery was billed as 4800 kilowatt hours at 2¢ per hour, $96.00. This should have

(Testimony of Fred S. Eastman.)

been billed as 480 kilowatt hours at two cents, $9.60. We are, thus reducing the total amount due the University of Washington from $5,295.56 to $5,209.16. This account is long past due and we would appreciate an immediate remittance."

Shop work would appear on the bill, and all shop work done outside the University where models were brought in for testing was not done by our University employees to our knowledge; this might have been done, however.

JAMES HERBERT DWINNELL,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

By Mr. Binns:

I reside at 143, 3836 Northeast, Seattle, Washington. [93-f] I am employed at the University Aeronautical Laboratory. I am assistant supervisor of the aeronautical laboratory; also I am an instructor in aeronautical engineering in the University. Under Mr. Eastman I supervise wind tunnel tests, conducted there by ourselves for companies, I supervise tests made by companies, or company representatives present; I supervise tests made by ourselves for our own research program.

I am acquainted with the defendant Edward F. Zap. I met the defendant Edward F. Zap when the

(Testimony of James Herbert Dwinnell.)

wind tunnel was first started up, back in 1939. I was employed—or, rather, I was employed about six months after the wind tunnel was started up, in the capacity of computer and what-not. In other words, I was a new graduate at that time, and then I worked up to be assistant chief computer, at which time I met Mr. Zap; then later on I was made chief computer and then instructor and assistant supervisor. [93-g]

I was assistant supervisor December 1st of 1941.

Q. By Mr. Binns: Will you relate, as briefly as possible, what is meant by a wind tunnel test?

A. Well, a wind tunnel test is conducted in order to save time in determining the performance characteristics of an airplane. A model is built of the complete airplane, showing somewhere around a 1/10th scale. In other words, the linear dimensions reduced to tenths. And then that model that is, incidentally usually built of hard wood and metallic substances, is put in an air stream. This is the precise opposite of building a model like these children fly a model through the air, it is the opposite, we hold the model still and pass the air over the model, and then by electrical and mechanical means we throw the forces on that model to determine the aerodynamic characteristics of the model, from which we may predict the performance. In other words, the predicted range, endurance, rate of flight, and so forth.

A wind tunnel report is the result of a test. In

(Testimony of James Herbert Dwinnell.)

Mr. Zap's case a test made by a company—perhaps I should explain a little more fully—the forces that are measured on a model are recorded electrically on a hatch panel, that hatch panel has photographs and from those photographs we can read off the forces and the air speed, and all of the other items we are interested in concerning the model, and then that series of photographs goes into the computing room, [94] and in the computing room computations are made and curves drawn, and these curves are assembled into a report and sent to the company along with our description of the test. We don't, in general, analyze the data unless specifically asked by the company.

One report necessarily means that that report is made on one model; they do not mix models in a report. I could explain that a little more fully too—in that one model there may be several hundred changes, they may change the tail, they may put a new tail on, something like that, but basically the model is singularly for one report.

In connection with the work performed for Mr. Zap, and report No. 77, for me to tell you what type of model that report was compiled in relation to, it might be more convenient if I referred you to the drawings sent by Mr. Zap's organization and the photographs which we took of the model while it was in testing. I can show you a photograph of every model we have ever tested; for each report the outline of computations made is kept in a separate folder for our records. We have one sheet on

(Testimony of James Herbert Dwinnell.)

each and a complete record of all tests is made, and the computation on that sheet is sent to the company, and then all the drawings received from the companies are kept in this folder. The actual computations are usually somewhere else; not kept in a folder like this.

I can show you a photograph of every model we have [95] ever made. I can tell what model was used in Report 177. I have several photos. I have one drawing of the wind.

(Proceedings were here had without the hearing of the jury as follows):

Mr. Lavine: Of course, these papers and documents are hearsay unless the Government intends and does assure the Court they are going to connect them up in some manner with the defendant Zap and that he has knowledge of them. These are reports at the University of Washington, made by the University of Washington.

(Further proceedings were resumed within the hearing of the jury as follows):

Mr. Binns: I ask this group of photographs, held together with the rubber band and the yellow slip of paper, saying "Report 177," 1 to 10, be marked as the Government's Exhibit next in order.

The Clerk: Government's Exhibit 9 for identification.

(The documents referred to were marked as Government's Exhibit No. 9, for identification.)

Mr. Binns: I show you some photographs

(Testimony of James Herbert Dwinnell.)

marked Government's Exhibit 9 for identification, and ask you what this is a picture of?

Mr. Lavine: Objected to as irrelevant, immaterial and incompetent; no proper foundation laid.

The Court: Overruled. [96].

Mr. Lavine: Exception.

The Witness: They are a picture of one of the airplane models expressed by Mr. E. F. Zap. I can only refer to the company since, as I recall, Mr. Zap was not present; he sent one of his representatives. Mr. McLauchlin came with the model. Usually in testing, some representative of the company comes, and in this case I am fairly certain Mr. McLauchlin was present at the test, although I don't recall whether Mr. Zap was. The model shown [96-a] in these photographs was sent to the University from E. F. Zap, Aeronautical Engineers.

Mr. Binns: I ask that that be admitted in evidence at this time.

Mr. Lavine: To which we object, no proper foundation laid as yet. Mr. Zap is not bound by this witness' statement as to some—what this witness says was received from somebody in the organization.

The Witness: Unfortunately we didn't ever make a report to Mr. Zap on this model. I don't know if it is necessary to explain——

Mr. Lavine: No, it is not.

The Witness: All of the data compiled from the wind tunnel tests of this model we gave to Mr. McLauchlin. I have other drawings that Mr. McLauch-

(Testimony of James Herbert Dwinnell.)

lin used during these experiments—not previously, but subsequently. Mr. Zap was present at least on one occasion with Mr. McLauchlin, and discussing the models or the work, they both came together.

The Court: In evidence.

Mr. Lavine: Exception.

The Clerk: Government's Exhibit 9 in evidence.

(The documents heretofore marked for identification as Government's Exhibit No. 9, were received in evidence.)

Mr. Binns: May I have this sheet of paper bearing the [97] stamp "Confidential," and a pencil drawing of an airplane wing, be marked Government's next exhibit in order?

The Clerk: Government's Exhibit 10 for identification.

Mr. Binns: While we are waiting may I have these three sheets entitled—pardon me—four sheets, entitled, "WUAL-Dwinnell Log—Zap Project 15," marked as the Government's next exhibit in order?

(The documents referred to were marked as Government's Exhibit No. 11, for identification.)

Mr. Binns: May I have this one sheet of paper, which is a drawing of an airplane, marked in the upper right hand corner "AWAL-Rap. 177,"——

The Witness: Excuse me, that would be "UWAL."

(The document referred to was marked as Government's Exhibit No. 12, for identification.)

(Testimony of James Herbert Dwinnell.)

Q. By Mr. Binns: Mr. Dwinnell, I show you this paper marked Government's Exhibit 10 for identification and I will ask you if you have seen it before?

A. Yes—in the aeronautical laboratory. I cannot guarantee where I got it, because it might very well have been given to one of my assistants. I don't think that was handed directly to me. However, down at the bottom there is "E. F. Zap." I cannot testify from where that document came into the possession of the University.

Mr. Binns: We offer that in evidence, your Honor, upon the basis of the printed legend in the lower right hand corner. [98]

The Court: As I understand it, no report was ever made to Mr. Zap with reference to the design that is on this exhibit, Government's 10 for identification.

The Witness: That was because of the lack of student help at the University, we allowed Mr. McLauchlin, Mr. Zap's representative, to take all the data. By data, I mean data connected with the test. This has nothing to do with the compilation of data. This is merely for our records to show us how large the model was, and its description. I am willing to swear these dimensions here check with the dimensions I made personally. As far as the external appearance of the wing is concerned,——

This model—Report 177—in connection with this Exhibit 10 for identification; this is a drawing of only one part of the airplane. We turned over all

(Testimony of James Herbert Dwinnell.)

data concerned with that airplane to Mr. McLauchlin. This instrument I hold in my hand is a diagram of a part of an airplane. I've started to make some computations from that, the work on that, then when we found we didn't have sufficient help and Mr. Zap was in a great hurry to get the report over with in a hurry, we had to explain to Mr. McLauchlin that we couldn't do it. To—pardon me—I may have made a misstatement—Mr. McLauchlin, who said he was in a great hurry, so we explained to him we could not supply the student help to get the data out in time, and then we turned over all the data to Mr. McLauchlin and retained parts of it here in the labor- [99] atory.

The Court. Admitted in evidence.

(The document heretofore marked for identification as Government's Exhibit 10, was received in evidence.)

Mr. Lavine: Exception.

Q. By Mr. Binns: I will show you this line drawing, Government's Exhibit 12, and ask if that is a line drawing of the model plane tested in Report 177.

A. I cannot tell where that came into the possession of the University of Washington. No more so than the other one. That is a side view of the complete airplane. It is the same airplane.

The Court: All right. In evidence.

(The document heretofore marked for identification as Government's Exhibit 12, was received in evidence.)

(Testimony of James Herbert Dwinnell.)

Mr. Lavine: Objection and exception.

The Court: Exceptions are noted.

The Clerk: Government's Exhibit 12 in evidence.

Q. By Mr. Binns: I show you these four documents, marked Government's Exhibit 11 for identification, and ask you what they are.

A. This is a record of the tests made in our laboratory on Report 177, and this probably cannot be read by anybody but our own staff with very much intelligence. We furnished a copy of that report to Mr. McLauchlin. This is primarily [100] for our use, and he requested we give him a copy of it.

Q. By Mr. Binns: So you gave him a copy of it? A. That is correct.

Mr. Binns: We offer this in evidence at this time, your Honor.

The Court: Received.

(The document heretofore marked for identification as Government's Exhibit 11, was received in evidence.)

Mr. Lavine: The same objection and exception, no proper foundation laid.

Mr. Binns: There is printed across the top of this: "Zap Project 15."

The Witness: I cannot tell from whom I received the information upon which I got that printed legend.

Q. Now, then, Mr. Dwinnell, calling my attention to Report No. 178, I have a photo of the model used in that report?

(Testimony of James Herbert Dwinnell.)

A. There are more photos here of 177, and more of 178. Probably a student put this thing together.

Q. By Mr. Bimm: Mr. Dwinnell, I show you a group of photos marked Government's Exhibit 15, for identification.

A. I have seen those before. They are photos of the model tested in report 178. I might explain that we didn't furnish any complete reports, including and after report 177. I furnished the data compiled to the Zap Aeronautical Engineers. We furnished the data as it was taken from the [101] wind tunnel. The person to whom we furnished the data in this particular instance was Mr. McLauchlin. Mr. Zap was not in Seattle in connection with report 178—not to my knowledge.

I have only what is called the U. W. A. L. tunnel log. Report 189 and 190 are mixed up in there. Report 189 and 190 are Government's Exhibit 14, for identification.

I am familiar with the model used in compiling report No. 183. I am familiar with the report used in compiling report No. 188.

The Court: You may inquire, Mr. Lavine.

Q. By Mr. Lavine: You weren't present during the work on the model 177, were you? Were you present?

A. Yes, I was. I was not present for the whole time, but I was supervising it and conferring with Mr. McLauchlin, and I saw the models myself. As a matter of fact, I made some check of the dimensions, to make sure that the drawings sent to us were correct.

(Testimony of James Herbert Dwinnell.)

Q. Were you present during the time that——

Mr. Lavine: What was the other number?

Mr. Binns: 183.

Q. By Mr. Lavine: (Continuing)——183 were being made? A. Yes.

Q. And 188? A. Yes.

The Court: Objection overruled. Proceed. [102]

Mr. Lavine: Yes. I was just looking at this, your Honor. That is all.

Q. By Mr. Binns: The same model was not used in the compiling of report 177 that was used in compiling 183?

A. No, it wasn't. To my knowledge they were entirely different airplanes. The model used in report 183 and the model used in report 189, were the same airplanes.

Pardon me—I said 183 and 189. Reports 183 and 189 were on different airplanes.

Q. How about report 183 and 188?

A. Do you mind if I refer to my records? They may not have been the same wing, but they are for the same airplane. I am familiar with the model used in 178. That was not the same model which was used in report 183.

Mr. Lavine: Just a minute. I don't understand this witness to state that there were airplanes up there, but certain tests being made of certain models.

Mr. Binns: I will rephrase that question, your Honor.

Q. By Mr. Binns: The type of airplane a model of which was used in report 178, was not the same

(Testimony of James Herbert Dwinnell.)

type of airplane a model of which was used in report 183? A. They weren't the same.

Q. I show you a group of pictures marked Government's Exhibit 14 for identification, and ask you, have you seen those pictures before?

A. Yes, I have. They are both pictures of a wing [103] configuration alone. In other words, no tail or tail booms are on this particular model.

That model was not used in compiling any data for Mr. Zap. It was used in collecting data which resulted in reports 189 and 190. I couldn't tell that the same wing was used in compiling both of those.

(Government's Exhibit 14 was received in evidence.)

I have photos of the model used in compiling the data for report 183. Those are photos of the model used in compiling report 183.

(Government's Exhibit 15 for identification was shown to the witness who stated):

Those are the photos of the model used in compiling report 183.

(Government's Exhibit 15 was then admitted into evidence.)

I never did meet Mr. Zap personally—only in connection with wind tunnel tests at the University of Washington laboratory aeronautical laboratory. I had a conversation with him in regard to letterheads of the University of Washington. It must have taken place after the test was run in the University of Washington in laboratory designated as report

(Testimony of James Herbert Dwinnell.)

178. It was a conversation between Mr. Zap and myself.

(The following proceedings were had out of the hearing of the jury):

Mr. Lavine: I don't know what the Government proposes [104] here, but we want to object to any conversations with Mr. Zap at this time as incompetent, irrelevant and immaterial, no corpus delicti established, and you cannot establish that by conversation with this witness. For that reason I object unless the Government states what its purpose is, and it is shown to have some relevancy.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Witness: Prior to this conversation Mr. Zap had run a test in our laboratory designated as report 173. After [104-a] the test was run it was found, or I found out that that report should be split in two parts; one part was supposed to be Mr. Zap's private research, and the other was to be a report sent to the Navy. Now in splitting that report we found great difficulty in allocating the charges for power and for student labor. We found it, as a matter of fact, impossible to separate those two reports; so that I asked Mr. Zap how he wanted the reports split, if there was any way we could help him so that he could arrive at a reasonable estimation of how much to charge the Navy and how much to charge to himself, and he said the best way for us to do was just to give him a blanket charge for the whole report and then he would seg-

(Testimony of James Herbert Dwinnell.)

regate it himself. And it was at that time that he suggested that we give him some of our correspondence paper, with our letterhead on it, University of Washington Aeronautical Engineering Department, so that he could use it, I assumed.

The Court: No, no, not what you assumed at all. Just the conversation.

Q. By Mr. Binns: Did you give him the letterheads?

A. He requested that we give him the letterheads so that he could take care of the bills. I did not give him the letterheads.

With reference to our report 173—we divided it and made it into report 173 and report 154-A. Report 173 covered the private project of Mr. Zap.

[105]

Mr. Lavine: Just a minute. Object to that as calling for a conclusion of the witness. The witness doesn't know what the private project was. He so testified. He couldn't segregate them. We couldn't segregate——

The Court: Yes, you said you couldn't segregate them: you couldn't separate them.

The Witness: That is what I intended to explain.

Mr. Lavine: Just a minute.

The Court: Just a moment. Did you make two reports to Mr. Zap?

The Witness: Yes, we did.

The Court: Did you discuss how they should be made with Mr. Zap?

The Witness: Yes, we did.

(Testimony of James Herbert Dwinnell.)

The Court: All right. Tell us then the conversation you had with Mr. Zap about making two reports.

The Witness: He told us how—or, rather, Mr. McLauchlin told us how to separate the reports.

By Mr. Binns:

Q. Now, Mr. Dwinnell, during the conversations with Mr. Zap in regard to the dividing of this report, did he tell you that there was certain private work of his own in there?

A. Yes, he did. At the time the report was written—rather at the time the report was run, I went out and had conversations with him to find out how he wanted the report [106] written, that is our customary procedure, and at that time he told me that either he or Mr. McLauchlin would tell me how to split the report; so that subsequently Mr. McLauchlin showed me how to do it.

Q. By Mr. Binns: Did Mr. Zap tell you that it would be necessary to split the report?

A. Yes.

Q. Did he tell you that some of the work that you had done had been done on private experiments of his own?

A. Yes. When the tunnel is in operation, not more than eighteen students are actively working on it at one time. Usually there are considerably less than that; they come in and work when they have no great periods, so it varies. At five o'clock in the afternoon of a certain day, there would be

(Testimony of James Herbert Dwinnell.)

a maximum of 18 students possibly working on the wind tunnel at the same time; we would be paying salary to 18 students then; on the other hand at sometimes there may be only five.

Q. I cannot select a day in your mind when the University of Washington was working on report 178; can you tell us the day and how many students were working?

A. There were a total of nine students working on report 178. All nine of these students would not work the same hours each day; they would come in and replace each other. It is hard to tell how many hours each student would [106-a] work. Some work a full day, and then don't work for a day, and then don't work for a day and then come in for half a day. I cannot tell on the first day of that report how many students were working.

The Court: Let me interrupt a moment. The Government exhibit which I have in my hand shows, under report 178, labor, 52 hours.

Cross Examination

By Mr. Lavine:

Q. Prof. Dwinnell, on what project was report 178 being performed?

A. I am sorry. You will have to give me the tunnel log of report 178. Project 15, according to our records.

Mr. Binns: 178?

The Witness: Yes.

Q. By Mr. Lavine: According to your records.

(Testimony of James Herbert Dwinnell.)

You have no knowledge of your own, of your own memory, now, of what project that was on?

A. You asked me the project number. It was No. 15.

Q. No, I asked you if you had an independent knowledge of what plane that was on.

A. My conversations with Mr. McLauchlan—let me make it another way. Mr. McLauchlan told me that the airplane tested in report 178 was specifically designed for long range and for high performance characteristics in that type of work [107] for a long range and carrying heavy loads.

Mr. Lavine: He has marked it Exhibit No. 15.

Q. By Mr. Lavine: Will you tell me what type of plane these were on? I am just asking you from the pictures now. You have identified the picture here. Can you tell us what those pictures are?

A. I know they are on the Gruman, but I can't remember whether it is F4F or F4F3, or just precisely what it was. You understand there are an awful lot of configurations tested on an airplane. That might be an aileron or a spoiler; I couldn't tell you. From the picture, I can't tell what it is, an aileron or a spoiler. It might be an aileron or a spoiler. That is a flap on the wing. That picture is an upstream view showing the flap configuration.

Q. As far as these photographs are concerned, you couldn't tell on what particular type of plane or what particular types of planes these particular flaps could be used on, is that correct?

(Testimony of James Herbert Dwinnell.)

A. No, a flap can be used on any kind of airplane. An aileron can be used on any type of airplane. This work that Mr. Zap was doing was exclusively on flaps and ailerons.

Q. Now referring to report 177 here—Government's Exhibit No. 12.

A. That is a flap. Wait a minute, just one moment. I am sorry. That is an aileron, referred specifically to by the Zap organization as a "rolleron."

[108]

This is an auxiliary control out in front of the wing. I have never heard of any specific name applied to it. (The witness then identified various photographs as flaps and ailerons.)

A Grumman is a Navy fighting plane. Mr. Zap was experimenting on different types of Government airplanes up there.

Mr. Lavine: Referring to Exhibit 9 now:—

A. That is just an airplane tested by Mr. Zap. I know very little about it except from my conversations with Mr. McLauchlan. There are flaps and—I am sorry. These photographs are so small that I can't tell whether there are ailerons on there, but there are flaps. There are flaps on these photographs in Exhibit 9.

Now referring to Government's Exhibit 13—I don't see any flap configurations, but there are aileron or spoiler configurations on the wing. That was described to me as a cargo-carrying plane; a cargo or a long range airplane. And in connection

(Testimony of James Herbert Dwinnell.)

with that description I personally have no knowledge about it. As far as these particular types of flaps or ailerons and spoilers—it is quite possible they would fit on any airplane, any type of airplane.

Exhibit 14—a picture of a wind model tested by Mr. Zap. It is a rather peculiar type of tip aileron here which, if I hadn't been told that it was an aileron I might have wondered what it was; and then there is another device on here which is a fluttering trailing edge; and that is about [109] all I can say about it. They could be applicable to any type of plane. You understand when I say any type of plane, I don't mean a little thing like a Taylor Cub, or something. You design a plane for a specific purpose. They could use these things for varying purposes.

Well, you design a particular piece of equipment to fit a particular airplane. If it doesn't need that equipment, there is no sense in going to all the work in designing it. However, it would be conceivable that the equipment designed by Mr. Zap and tested in our wind tunnel might be for the Grumman; I will admit that.

Q. Thank you. Do you have some other photographs here? I notice you have some other pictures which have not been introduced.

A. These have not been introduced. They were given back to me for some reason. These are tests of a two-dimensional wing—two-dimensional flow study on a wing. That is in connection with the

(Testimony of James Herbert Dwinnell.)

flap work. I couldn't tell you whether they are on the Grumman and other fighter planes of the United States Navy, or just a general study. The notation is not in my handwriting. I do not know what report these pictures were taken in connection with, independently, because report 154, 154-A, 154-B and 173 were all run on the same basic wing. I might be able to. May I see those?

Q. Yes.

A. These are report 154, and these must be connected [110] with report 173, 154-A or 154-B.

(The photographs referred to were marked Defendants' Exhibit G, and received in evidence.)

These pictures were the original report 154 and represent a two-dimensional flow study on a wing section. These are photographs of aileron and flap configurations on that particular two-dimensional flow study. Those will fit on the Grumman and United States Navy fighting planes. They could be so designed.

(The photographs referred to were marked Defendants' Exhibit H, and received in evidence.)

Q. By Mr. Lavine: Now I ask you to look at these pictures and say what they represent. What do those pictures represent?

A. Droppable gas tanks on the wing. I cannot tell whether that is a release for a bomb, without

(Testimony of James Herbert Dwinnell.)

referring to further records—and these tanks, I cannot tell what plane these were designed for. I just know that they were on that particular wing.

Q. By Mr. Lavine:

I recognize the photographs, but the only thing I don't recognize is the bomb, and the other article on there. I recognize this as one of Mr. Zap's tests made in connection with report 183 or 188. I recognize each and all of these photographs as in conjunction with one or the other of these two reports.

[111]

(The photographs referred to were marked Defendants' Exhibit I, and received in evidence.)

Q. By Mr. Lavine: I ask you to examine these photographs and see if you recognize those and what they represent.

A. They are tests on a wing made by Mr. Zap's organization.

Mr. Lavine: I offer these as defendants' next in order.

The Court: They will be received.

The Clerk: Defendants' Exhibit J, into evidence.

(The photographs referred to were marked Defendants' Exhibit J, and received in evidence.)

The Witness: Our University is known as having one of the leading if not the leading wind tunnel test equipment in the country. It is correct that

(Testimony of James Herbert Dwinnell.)

we do considerable work in connection with Government projects. Mr. Zap requested time in the wind tunnel, and we, when I say "we" I mean Mr. Eastman made all arrangements for his time in the tunnel. It didn't include 24 hours a day; it is a fact that Mr. Zap had a key to the wind tunnel; but we weren't testing 24 hours a day, but he was permitted to work in there at all hours of the day and night, so that Mr. Zap could go into the wind tunnel during the night, remain there as long as he wished, and work out his experiments and his problems to his heart's content, provided he didn't try to operate the tunnel. After he first came up there, during the earlier part of his experimentations up there [112] in the wind tunnel, I had an argument with him; not on his first visits; I did have some argument with him at one time over employing students at odd hours. No, I didn't tell Mr. Zap that it was against the rules of the University because the University didn't want the students working nights, which might interfere with their studies in the day; there are no restrictions about working at night. The argument was about just that we watch; the faculty, that is, of the University, watches the number of hours that students put in in outside work, and compare that with the number of hours that they are taking as a load in the University, and allocate a certain number of hours they are supposed to work in the wind tunnel, and they have to get special permission from us in order to work overtime.

(Testimony of James Herbert Dwinnell.)

The Court: Did you see them work, or did you know they were working down there?

The Witness: Well, if they work overtime we can't stop them. It is merely our suggestion that they don't work overtime.

Mr. Lavine: That is what I want to know.

The Witness: I didn't keep personal track of whether work was done on 183 or 188 or 178 personally; I really have no way of telling, of my own knowledge, just what amount of work was done on report 154-B or 178 or 189 or 183—not without referring to the records. Mr. McLauchlan did not necessarily discuss all of the various reports that he [113] was working on. He discussed it in general terms, but he didn't tell me what particular performance they expected to get out of the airplane. He just explained in general terms what some of the models were being designed for. 15 wind tunnel tests were conducted up there, pertaining to Mr. Zap, counting one report which was a supplementary report, which was not backed up with experimentation. In other words, it was a survey of another report, an estimate of performance and what-not. Mr. Zap was up there working day and night when he was up there; he was not always present. I couldn't guarantee that when he was present he was working day and night. I wasn't there day and night to watch him.

The Court: I notice in Government's Exhibit 8, for instance, under each report, taking any one of

(Testimony of James Herbert Dwinnell.)

them—say report 175, "Labor, 940 hours." Does that include student labor?

The Witness: That's entirely student labor.

The Court: And that is true of all of these items, is it?

The Witness: That is correct.

The Court: Where it says "Labor."

The Witness: Yes. My charge is absorbed in the supervision. As far as I know, the University has not received reimbursement on that particular bill. [114]

Redirect Examination

By Mr. Binns:

Mr. Zap had a key to the wind tunnel. He couldn't operate the tunnel at all. It's impossible to operate the wind tunnel without first 'phoning the power department, the power company—rather, the University Power Division, where we get our power, and it would be first necessary to 'phone them, and if the tunnel was operated at night we would immediately find out about it, because we don't run at night. In order to secure the necessary data to attach a Zap flap to a Grumman airplane, the type or model of airplane he would use in wind tunnel tests was generally the Grumman airplane.

In order to secure data for attaching a Zap flap on a Grumman airplane, it would not be desirable to rely on wind tunnel data which had been secured on some other model of airplane because the basic characteristics may be different. I would like to

(Testimony of James Herbert Dwinnell.)

make it clear, though, that you could run tests of a wing by itself and put a flap on it and expect to get similar results on any type of airplane to which you attached it. The practice in order to secure the data to attach a Zap flap to a Grumman airplane, the type of model I would use for final tests and final analysis, is a Grumman airplane.

[115]

Recross Examination

By Mr. Lavine:

Mr. Zap was trying out the Vought-Sikorski plane up there; a part of it. I couldn't tell you whether he was testing out flaps, as a basic principle, to any type of plane that might fly for the Navy. The two-dimensional model applies to any type of plane. That type of test is used specifically for basic analysis to see what would happen on any particular kind of airplane. It is a general test that is used for estimating what you might expect on any type of airplane. The calculators did not work at night, without special arrangements from us. As far as I know they didn't work at night, unless Mr. Zap or one of his representatives made specific arrangements. That is the only way that it is supposed to be worked. I couldn't tell you whether some of the students worked as high as 160 some-odd hours for Mr. Zap.

The Court: Exhibit 8 shows the amount of hours they worked, counsel. 960 on one job there, the second job.

(Testimony of James Herbert Dwinnell.)

Mr. Lavine: Oh, yes, I see. Well, I was trying to break it down.

The Witness: Some students worked a smaller number of hours and some worked longer hours. In connection with Mr. Zap's work, he was always anxious to get the work done at the earliest possible time and in the most expeditious fashion; but it's regardless of how much time he was [116] allotted. He seemed to be in a terrific hurry to get everything done, whether he had a week or two weeks to do it. In other words, he was a high-speed man around our laboratory. I can show you a letter from one of our files here, "Attention wind tunnel supervisor," from E. F. Zap, signed "H. S. McGill." I know Mr. McGill. I have met him there; I don't know whether he is Chief Engineer for the Zap Corporation. It is correct, I met him at the wind tunnel; he was conducting experiments with Mr. Zap, either with him or by himself; I have forgotten. This is one of the letters I brought with me.

Mr. Lavine: I offer this letter as defendants' next in order.

The Court: I will let it in. I will let it in.

The Clerk: Defendants' Exhibit K, in evidence.

(The document referred to was marked Defendants' Exhibit K, and was received in evidence.)

Q. By Mr. Lavine: Now referring to a letter I will show you, if we might take this apart—I think this is the only part material. Description of pro-

(Testimony of James Herbert Dwinnell.)

poled two-dimensional flow tests. That report 154 that you had and the pictures that you identified were of a two-dimensional flow test; isn't that correct?

The Witness: That is correct, for report 154. This is a description of the matter sent me as to the proposed test and the proposed model.

The Clerk: Defendants' Exhibit L, into evidence. [117]

(The document referred to was marked Defendants' Exhibit L, and received in evidence.)

Mr. Lavine: I would like to offer these additional exhibits which the Government has seen, as defendants' exhibit next in order.

The Clerk: That will be Defendants' Exhibit M, into evidence.

(The document referred to was marked Defendants' Exhibit M, and received in evidence.)

The Witness: I am familiar with tuft tests that were made at the University. The tuft tests are applicable to any particular type of ship.

Mr. Lavine: We offer these letters as defendants' next in order.

The Clerk: Defendants' Exhibit N, in evidence.

(The document referred to was marked Defendants' Exhibit N, and received in evidence.)

The Clerk: Exhibit O, into evidence.

(The document referred to was marked Defendants' Exhibit O, and received in evidence.)

(Testimony of James Herbert Dwinnell.)

Mr. Lavine: I offer these as next in evidence.

[118]

Mr. Lavine: I offer these as next in evidence.

The Clerk: Defendants' Exhibit P, into evidence.

(The document referred to was marked Defendants' Exhibit P, and received in evidence.)

The Clerk: Defendants' Exhibit Q in evidence.

(The document referred to was marked as Defendants' Exhibit Q, and was regeived in evidence.)

Mr. Lavine: I wish to read one letter and the rest I will reserve for such time as we may think it important. Reading from the Defendants' Q in evidence:

"9 February 1940.

"Professor V. J. Martin,
Department of Aeronautical Engineering,
University of Washington,
Seattle, Wash.

My dear Professor Martin:

This letter is in connection with Navy Department Contract No. 69327, Mr. Edwin F. Zap, contractor, which requires the development of certain devices to reduce aerodynamic drag and improve the lift of several service type airfoils in use on new Navy service aircraft.

Mr. Zap's contract is being handled through this office and he requires the use of a wind-tunnel for a few days in order to complete the

(Testimony of James Herbert Dwinnell.)

investigations involved. The use of the local wind- [119] tunnel at Cal Tech cannot be obtained until about 15 March, due to prior reservations, which of course results in a corresponding delay in getting the project completed and in the hands of the Bureau of Aeronautics (Navy Department). We have been informed that your wind-tunnel at the University of Washington might be available for this work and, accordingly, I am writing you to ask your cooperation in an effort to expedite this project, which is regarded as highly important by the Department.

In the event that you can make your wind-tunnel available to Mr. Zap at any time during the next two or three weeks, will you kindly inform me at once giving the dates when the tunnel can be allocated to our development project. This office will keep Mr. Zap informed.

Very truly yours,

L. D. WEBB,

Commander, U.S.N."

R. C. DAVIS,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please. [120]

(Testimony of R. C. Davis.)

The Witness: Raymond C. Davis.

The Court: Take the stand, please.

Direct Examination

By Mr. Maury:

I am the Controller of the University of Washington at Seattle. As such I have the books and records of the accounts of that institution under my supervision and control. I am familiar with the account of Edward F. Zap with the University of Washington.

The Court: Government's Exhibit 16 for identification.

(The document referred to was marked as Government's Exhibit No. 16, and was received in evidence.)

By the Witness: Government's Exhibit 16 in evidence is a bill which the University of Washington, a carbon copy, sent to Edward F. Zap in this city.

Q. And does it truly reflect the account of the University of Washington with Mr. Zap?

A. There is a credit memorandum that went out subsequently that does not appear here.

The Clerk: This will be Government's Exhibit 17 in evidence.

(The document referred to was marked as Government's Exhibit No. 17, and was received in evidence.)

(Testimony of R. C. Davis.)

Q. By Mr. Maury: Calling your attention to Government's Exhibit 17, is the credit memo of which you speak, or a [121] carbon duplicate thereof?

A. It is in the sum of $86.40. Deducting this credit of $86.40 from the total shown on Government's Exhibit 16 in evidence we arrive at the true balance which Mr. Zap owes the University. I cannot tell from what period of time that date covers. I can tell you the date up to the time it covers, but not the exact period; that is, I cannot tell you the dates between the date it covers, the work we did for Mr. Zap subsequent to some time in 1942, up to July 31, 1941. By examining the ledger sheets of the University of Washington I can make that determination.

Calling my attention to those two sheets of paper now I believe marked Exhibit 18, for identification —I can tell that these are the original ledger sheets of the University of Washington. The account of Edward F. Zap is there. The invoice previous to this invoice here is dated September 3rd, 1941. And this was the next subsequent invoice. (Indicating Exhibit 16.) That previous invoice of September, 1941, was paid. That may not have cleared the account at that time, because there may have been some work in the tunnel subsequent, or prior, to September 3rd; there may have been a small lapse in there, because the original record is made up and sent to my office, then there is a record in the wind

(Testimony of R. C. Davis.)

tunnel records that would reflect that. However, there is a charge there of $1630.67, and a credit of the same amount. And the next charge is identical with [122] that. The final entry under the Zap account is the credit memorandum of $86.40.

Q. By Mr. Maury: Mr. Davis, did that invoice, Exhibit 16, include all the charges for electrical power which was used by Mr. Zap on this tunnel from the period ending or beginning September, 1941, and ending as of the date of that invoice?

A. As far as I know it must have. When I say "it must have"—the University has a contract with the Puget Sound Power & Light Company, and we have a master meter, and all the billing to the University is done by the Puget Sound Power & Light Company under the master meter. However, there is another meter in the wind tunnel that is used solely for the purpose of determining the amount of power used at the wind tunnel and that is charged to our customers.

Then the Power & Light Company bills you from the master meter, and the bill arrives in our office personally.

I couldn't say positively whether or not the power company bill has been paid by the University for each and every month from the period beginning August 1st, let us say, 1941 and ending December, 1942. I have not examined the record, but it is possible that there might be some outstanding.

(Testimony of R. C. Davis.)

Cross Examination

By Mr. Lavine:

I sent you a copy of this credit memo in a letter. I have not received any payment as yet. [123]

Q. Now, in connection with your accounts receivable here, your records here go back to June, about 1940, I believe, that Mr. Zap—January 2, 1940, E. F. Zap, and No. 155, and then there appears to be some cancellation.

A. That was an error. The University of Washington makes errors occasionally. On January 19th Mr. E. F. Zap was billed and that bill was for $1,117.50.

Q. And there was a payment of $500?

A. That is right. It was not a payment. It is the application of a guarantee deposit—a guarantee deposit on this invoice. We had the money and we credited it to this invoice. That was to be used as a guarantee of the payments.

Q. Now, you had a payment again, however, you had a payment on March 13th—11th, 1940, of $517.50 by Mr. Zap. And then February 5th there was another bill and that seems to be cancelled again? Another mistake? Is that right?

A. Well, a clerical error—let's call it that.

Q. All right. July 30th, Mr. Edward F. Zap was billed again, and that amount was $896.16.

A. We received payment of $896.16. We have another bill to Mr. Zap, February 14, 1941, for

(Testimony of R. C. Davis.)

$2617.49. I received $2617.49. We had another bill on September 3rd, Mr. E. F. Zap, $1630.67. We received $1630.67 from Mr. Zap. On August 28th we billed Mr. Zap for $5295.56. We have since sent a letter about it and our records show no payment. [124] That item of $5295.56 is for the work done from the former occasion when Mr. Zap was there; at least, it was for the work done during 1942. We used the $500 as the first payment on this first invoice. We have credited Mr. Zap on March 25th with $86.40.

I have records to show that the $500 was credited against the thousand dollar invoice and that the $500.00 guarantee fund was used to pay the other half of the $1,000 invoice after the payment of $517.50 in cash was received. The correspondence on the last item was March 25, 1943; a copy of that was mailed to Mr. Zap and Mr. Lavine, together with a copy of my letter explaining the clerical error.

In connection with these different items—this item to Mr. Zap of January 19th, showing bill March 5, 1940—we billed that on March 5, 1940, and received payment on March 13, 1940. And then the second item on the bill here; billed that on February 18th, and it was paid on March 3, 1941. And the billing on the next item was billed September 3, and it was paid September 26th, 1941. And the only one that has not been paid is the last item on our bill.

LUCIEN SMITH MINOR,

recalled as a witness by and on behalf of the Government, having been previously duly sworn, was examined and testified as follows: [125]

Direct Examination

By Mr. Binns:

Q. Lieutenant Minor, during your period of duty as Naval Cost Inspector did you receive a letter concerning naval project contract between the United States Navy and Edward F. Zap for design work on a cargo carrying airplane?

A. No, I didn't. The first I ever heard of that was when this investigation was begun.

Q. Was there a contract existing between E. F. Zap and [125-a] the Navy, providing for design work on that item of a cargo carrying airplane?

A. Not to my knowledge.

Mr. Lavine: I object to that, not the best evidence.

The Court: He asked him whether or not he knew of his own knowledge. Do you know about it? What you know about it, not what the Navy knows about it. Did you handle any such?

The Witness: No, not to my knowledge.

Mr. Binns: I have a group of documents to be marked for identification. I would like the record to show they have been examined by the counsel for the defendants during the morning hours.

The Court: All right.

The Clerk: That will be Government's Exhibit 19.

(Testimony of Lucien Smith Minor.)

Mr. Binns: Could I have these broken down into separate exhibits, these that are clipped together?

The Clerk: You want them separate?

Mr. Binns: I will hand them to you in order.

The Clerk: All right.

Mr. Binns: I hand you this group wrapped in blue ribbon with the seal of the United States, of the Comptroller General of the United States, containing four documents.

The Clerk: Government's Exhibit 19 for identification.

(The documents referred to were marked as Government's Exhibit No. 19 for identification.) [126]

Mr. Binns: I hand you another group under the seal of the Comptroller General's office containing five pages.

The Clerk: Government's Exhibit 20 for identification.

(The document referred to was marked Government's Exhibit 20 for identification.)

Mr. Binns: I hand you one document under the seal of the United States Navy.

The Clerk: Government's Exhibit 21 for identification.

(The document referred to was marked Government's Exhibit 21 for identification.)

Mr. Binns: I hand you a document dated June 26, 1942 signed "Edward F. Zap."

(Testimony of Lucien Smith Minor.)

The Clerk: Government's Exhibit 22 for identification.

(The document referred to was marked Government's Exhibit 22 for identification.)

Mr. Binns: I hand you what purports to be a copy of a document labeled "Schedule C".

The Clerk: Exhibit 23 for identification.

(The document referred to was marked Government's Exhibit 23 for identification.)

Mr. Binns: I hand you a document with the seal of the United States Navy containing two documents.

The Clerk: Exhibit 24 for identification.

(The document referred to was marked Government's Exhibit 24 for identification.) [127]

Mr. Binns: I hand you a group of six documents, the first of which says, "Endorsement resident inspector of Naval Aircraft, El Segundo, California."

The Clerk: Exhibit 25 for identification.

(The document referred to was marked Government's Exhibit 25 for identification.)

Mr. Binns: I hand you two documents, the first of which says, "Certificate of Withdrawal from Naval Control Accounts."

The Clerk: Exhibit 26 for identification.

(The document referred to was marked Government's Exhibit 26 for identification.)

(Testimony of Lucien Smith Minor.)

Mr. Binns: I hand you two documents, the first of which says, "Certificate of Withdrawal from Navy Control Accounts."

The Clerk: That will be 27 for identification.

(The document referred to was marked Government's Exhibit 27 for identification.)

Mr. Binns: I hand you a document dated October 30, 1942 signed by E. F. Zap.

The Clerk: Exhibit 28 for identification.

(The document referred to was marked Government's Exhibit 28 for identification.)

Mr. Binns: I hand you three documents, the first of which is dated October 30th, addressed to the Disbursing Officer of Supplies, and Accounts.

(Government's Exhibit 29 for identification, 30 for identification, and 31 for identification were marked by the Clerk.)

Q. I show you this group of documents marked Government's Exhibit 29 for identification and ask if you have even seen [128] those documents before. Please go through these documents from the beginning to the end? A. Yes.

Q. Will you please identify each document separately for us and tell us what it is? [128-a]

By the Witness: The first is a public voucher No. 39, that being the number assigned to it by our office, in connection with contract No. s83142.

Q. Is that document prepared by your office?

A. Yes.

(Testimony of Lucien Smith Minor.)

Mr. Binns: I ask that that document be admitted in evidence at this time, your Honor.

The Court: In evidence.

(The document referred to, heretofore marked Government's No. 19 for identification, received in evidence.)

The Court: Gentlemen of the jury, we will take a recess until 1:00 o'clock tomorrow afternoon.

(Thereupon, at 6:10 p. m., an adjournment was taken until 1:00 p. m., Friday, April 9, 1943.) [129]

LUCIEN SMITH MINOR,

recalled as a witness and on behalf of the plaintiff, having previously been duly sworn, was examined and testified further as follows:

Direct Examination
Resumed

By Mr. Binns:

At the close of court yesterday I was telling you what the first document was which is contained in the group of documents marked Government's Exhibit 19, for identification. The first document is public voucher No. 39. That is the number assigned by the cost inspector's office, covering cost incurred on Contract No. 83142. That is my signature which appears in the middle of the document. The second document is public voucher No. 40 on the same contract. That is my signature which appears in the

(Testimony of Lucien Smith Minor.)

center of the document. Those documents are signed by Mr. Zap. The third document of this group submitted by Mr. Zap covered traveling expenses, subsistence, etc., incurred by his employees while at Daggett Field on 28th-31-42. The third document was part of the supporting data for the preparation of Voucher 39. The fourth document is an invoice submitted by Mr. Zap which I saw at the time the public voucher for payment thereof was prepared in his office; it is the document upon the basis of which I prepared the voucher previously identified as number 40. [130] I am showing you the fifth and last document of this group; I have seen that document before, in my office. That document is additional support for voucher 40.

Mr. Binns: I offer this group of documents in evidence at this time, your Honor.

(The documents referred to were marked Government's Exhibit 19, and received in evidence.)

Mr. Binns: I am reading at this time from the fifth of the documents admitted in evidence as Government's Exhibit 19.

"I, Edward F. Zap, do hereby certify that I have paid to William McAvoy the sum of Four Thousand and no/Dollars as payment for flight test of OS2U2, under terms of contract No. 83142, this being paid by my check, 4679, dated 9-23-42. "Edward F. Zap."

(Testimony of Lucien S

Pardon me. The numb
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(Testimony of Lucien Smith Minor.)

Government's Exhibit 23 for identification; it was prepared in our office in support for voucher under Contract 4105.

Government's Exhibit 23 received in evidence.

I have seen Government's Exhibit 22 for identification; Mr. Zap submitted it to us for reimbursement.

(Voir Dire) By Mr. Lavine: Mr. Zap gave us a mimeographed copy signed; he did not hand it to us personally; [130-b] I do not know who typed it; I know where it was typed; I did not see it typed; nor did I see someone prepare the document. I first saw it in my office in Beverly Hills; Mr. Zap was not present when I first saw it.

Mr. Lavine: I object, your Honor. There is no proper foundation laid for that document.

Q. By Mr. Binns: I asked you, Lieutenant, did you see the original of the document of which Government's Exhibit 22 for identification purports to be a copy?

Mr. Lavine: Just a minute. I object to that as calling for the conclusion of the witness, and not the best evidence.

The Court: That is proper, to ask him that. You ask the witness if he saw the station down here at noon.

Mr. Lavine: But where there is a document available to the court and to the counsel, "I forget as to whether or not this is an original," is merely a conclusion of this witness. Your Honor, that is my point. We can see whether it is an original.

(Testimony of Lucien Smith-Minor.)

The Court: Let us have the document. Where is it?

Q. By Mr. Binns: Can you tell us, Lieutenant, where the original of that document is?

Answer: The original of that document, I believe, is attached to the voucher, to the original copy of the voucher, and payment was made to Mr. Zap.

[130-c]

Mr. Lavine: It is available here by certification, as you have produced the other documents, or the original, your Honor.

Mr. Binns: You are anticipating, Mr. Lavine. I have not offered the document in evidence. All right.

Q. By Mr. Binns: Lieutenant, can you look at Government's Exhibit 21 and tell us if—and tell us what was included under the heading Schedule C on that Government's exhibit?

Mr. Lavine: Just a minute, Lieutenant. I object to that as calling for the conclusion and opinion of this witness; certainly not the best evidence. Here is a typewritten document and this witness is being asked to tell something about the meaning of some paragraph, or some phrase or construction of this document.

Mr. Binns: I will withdraw that.

The Court: The document speaks for itself, I think.

Mr. Lavine: Yes, your Honor. In that I concur.

The Witness: We prepared Exhibit 21 in our office.

By Mr. Lavine: Schedule C is prepared in the

(Testimony of Lucien Smith Minor.)

form of a written schedule, but it is Government's Exhibit 23.

The Witness: The seventh item in Schedule C attached to Government's Exhibit 23 was included in that schedule upon a certification by Mr. Zap to the effect that he had paid the University of Washington $500 to cover [130-d] power costs, power to be used in the wind tunnel; that voucher was prepared under my direction; I saw it prepared; I signed it; it was made up by Miss Muriel B. Sando, the typist in our office. It was based upon a request of Edward F. Zap; Mr. Zap submitted an invoice signed by himself; over his signature. Mr. Zap personally did not submit the invoice to me personally; my recollection is that Mr. Zap submitted the invoice to Mr. Byars; I know Mr. Byars and I discussed it with Mr. Zap; in Mr. Zap's office, in Mr. Byars' presence, after Mr. Zap had submitted it, we questioned it, and attempted to question him and ask an explanation of this $500 charge; that was about the latter part of June.

The Witness: At this conversation to which I just testified concerning the $500 charge which is itemized in Schedule C, Government's Exhibit 22, we went to Mr. Zap and made inquiry of him as to why the payment has been made. His reply was to the effect that he had made a deal with the Seattle Power Company by which he could save considerable money by paying them direct for power cost. This $500 covered a partial payment they

(Testimony of Lucien Smith Minor.)

paid them for power, so at that time with that explanation we requested him to prepare a more detailed invoice, certify it and get its approval by the technical inspector. [130-e]

Government's Exhibit 24 for identification was received in evidence.

Government's Exhibit 25 for identification was received in evidence.

Government's Exhibit 26 for identification was received in evidence.

Government's Exhibit 27 for identification was received in evidence.

Government's Exhibit 28 for identification was received in evidence.

Government's Exhibit 29 for identification was received in evidence.

Government's Exhibit 31 for identification was received in evidence.

Government's Exhibit 30 for identification was received in evidence.

(The following proceedings were had at the bench, out of the hearing of the jury:)

Mr. Lavine: I would like to have Mr. Myerson come up so that I can interrogate him, your Honor.

The Court: All right.

Mr. Maury: To which we object.

The Court: What is the point?

Mr. Lavine: This was part of an illegally searched [130-f] and seized document taken from the plant of Zap, and at this time we are going to move to suppress the evidence so taken.

(Testimony of Lucien Smith Minor.)

The Court: Wasn't that all passed upon by Judge Yankwich?

Mr. Lavine: The preliminary part was passed upon, yes, [131] sir, but as I read the Weeks case, your Honor, we should renew the motion in the trial court.

The Court: I will deny it if Judge Yankwich has passed on it. I will not go over all the matters he has passed on, gentlemen. So make your motion.

Mr. Lavine: I at this time move to suppress the evidence in connection with a book of check stubs which is now being taken, and evidence is attempted to be offered in connection with the stubs on examination of the witness Minor. These stubs are numbered 4 to 300, and also contain apparently some cancelled checks and returned checks of various kinds and character. We would like to inquire from Mr. Myerson as to what date these were taken and under what authority, your Honor. We were not permitted to examine—we did not have any testimony from Mr. Myerson before Judge Yankwich. We proceeded on affidavits.

The Court: The evidence you are asking there is now in the absolute possession of the defendants, because if they were defendant's property and taken from him, the defendant would be in as good a position as anyone else to know the date they were taken.

Mr. Lavine: No, your Honor. The situation was that Mr. Zap was out of the city. He was in Washington, D. C.

(Testimony of Lucien Smith Minor.)

The Court: Did they break in?

Mr. Lavine: No. The agents were in the office of the defendant's place of business. [132]

The Court: Were there some of Mr. Zap's employees there?

Mr. Lavine: Yes, there were some employees there.

The Court: Then he ought to know the date.

Mr. Lavine: The dates set forth in the affidavit, I believe, are on or about November 5th, and dating from October 30, 1942. Now the alleged basis for taking of these articles was an affidavit of Mr. Myerson that he had seen these various articles on a previous occasion. That affidavit was filed as of December 1, 1942. However, we object to the use of this evidence, and at this time we object to it on the grounds that it is violative of the Fourth and Fifth Amendments to the Constitution of the United States, and request that the evidence be suppressed on that ground, and that it be returned to the defendant Zap.

Mr. Maury: The position of the Government, of course, your Honor, has been laid before Judge Yankwich's division of this Court; namely, that under the contracts 83142 and NXs 4105, now in evidence, the defendant Zap covenanted and agreed with the Government that all of his books and records and financial statements and books of account and other records of the enterprise might at all times be subject to the scrutiny of the proper gov-

(Testimony of Lucien Smith Minor.)

ernmental officials; that during ordinary business hours they should be open to the audit by Navy inspectors and Navy auditors; that by the affidavit of Hilton Byers the foregoing is shown and that the Court [133] can now see it from the contracts in evidence; further, that the return on the search warrant is sufficient evidence of the date of the taking, inasmuch as it shows upon its face and is a record of this Court, whatever date it was, I believe it was about December 1, 1942; that if it is not in the files of this Court but in the files of the United States Commissioner's office, then a true and correct copy thereof is attached to the affidavits filed in connection with the previous motion to suppress made with respect to the documents involved, and of which the document in counsel's hand, namely, the check stub book, as previously described by him, is one.

Mr. Lavine: Now, in answer to that, your Honor,——

Mr. Maury: Just a moment.

Mr. Lavine: Pardon me. I thought you were through, counsel.

Mr. Maury: On the further ground that to try the motion here and now would be to dismiss the jury for perhaps two or three days, would reverse the ruling of Judge Yankwich as to the form of how the motion should be handled, that is, as upon affidavits or upon oral testimony; upon the ground of surprise; that we had no previous notice that this motion for the taking of oral testimony or a motion

(Testimony of Lucien Smith Minor.)

to suppress would be brought before the Court at this time; and upon the further ground that no right of the defendant Zap has been invaded under the contracts which are now in evidence before the Court, and that at all times the Government had a right to [134] inspect these documents, and under the search warrant issued by this Court the Government had the right to take into possession these documents.

Mr. Lavine: In answer to that, your Honor, I wish to point out, first of all, that the right of inspection to which counsel refers is only a right to audit and to permit the books to be seen by the auditing office of the United States Navy, not to be unlawfully seized and taken by members of the Federal Bureau of Investigation; that there is nothing in the contract that permits that unlawful search and seizure, which is forbidden by the Fourth and Fifth Amendments, nor the use of evidence so obtained.

As to the particular documents, the affidavit of Investigator Myerson was to the effect that on a previous occasion he had seen these particular documents. His affidavit did not set forth that he was getting them by reason of any investigation or by reason of any audit made by any departmental agency of the Government; furthermore, the evidence by affidavit, which is uncontroverted, shows that they were unlawfully taken, without any search warrant at the time they were actually taken and

(Testimony of Lucien Smith Minor.)

seized, and that they were taken by members of the Federal Bureau of Investigation, not by Navy cost inspectors whose only authority was to inspect it. These were the property and personal property of Mr. Zap, and they were at his regular place of business. He was out of the city at the time the inspections [135] occurred. No one, therefore, had a right to seize them and take them away under our Fourth and Fifth Amendments.

Now, in connection with the further claim of the Government of surprise, of course, that is untenable because in the course of trial that is the second opportunity when a defendant makes his objections to the use of unlawfully searched and seized evidence. That is the doctrine in the Weeks case; that is the doctrine of Gouled vs. United States in 65 Law Edition. That is the doctrine enunciated in the Goldman case, which was decided at the last term of court, which contained a very strong opinion outlining many of the principles which I have set forth in the dissenting opinion of Judge Murphy.

I set forth my position here very fully, your Honor, and your Honor may appropriately rule. I do feel I have a right to take Myerson's testimony at this time, which we never did have the opportunity of taking. We could not necessarily, under the position he occupies, get an affidavit from him. Our only opportunity to secure his testimony is by placing him on the stand. He is here in court. We wish to do that.

(Testimony of Lucien Smith Minor.)

The Court: What do you want to show by him?

Mr. Lavine: I want to show——

Mr. Maury: To that we object, your Honor.

The Court: Yes, I know.

Mr. Maury: Because there has been an offer of proof [136] made in writing by counsel in the motion before Judge Yankwich, and ordered stricken from the files. No subpoena was issued for the witness Myerson by the defendant, and no request was made for his presence in court at the time of the hearing; and the record is also here, a portion which has not been mentioned by counsel, namely, the affidavit of Hilton Byers, the senior cost accountant for the Navy, who has stated to this Court that the Federal Bureau of Investigation for a period of some weeks were at the Zap plant inspecting these books under his observation and his authority under these contracts, and tracing that authority from the F.B.I. to the Navy cost accountant, to the contracting officer, right back to the United States, that is the alleged unlawful search and seizure.

The Court may, of course, not be so familiar with the record. This was before Judge Yankwich when he ruled upon the motion. But there were two search warrants; one issued by the United States Commissioner upon the 31st of October, and the second one issued by the United States Commissioner about the 1st of December; about 30 days apart. The allegation is that there was an unlawful search

(Testimony of Lucien Smith Minor.)

and seizure made some time during those periods, between those two dates. The affidavit of Byers shows that the agents of the F.B.I. were there under his authority during that period of time, and that authority, of course, traces right back to the contracts which the defendant Zap entered with the United [137] States Navy. That is the state of the record, and I merely desire to call that to your Honor's attention. I feel that it is highly improper at this time to seek to elicit testimony as to a purely collateral matter. The record is replete. The defense has had ample opportunity to complete its record in that respect. The record has been before the Court. It has been thoroughly and fully considered and has once been ruled upon by Judge Yankwich.

Mr. Lavine: In answer to that, your Honor, insofar as the statement of Hilton Byers is concerned, Hilton Byers is a civilian cost inspector of the United States Navy. His authority under the contract which is here shows no authority whatever to permit the F.B.I. or anybody else to take those records, papers or documents. There is nothing in the contract that permits their removal or confiscation or search or seizure. One contract gives the authority merely to audit and inspect, and the other gives authority to make a full inspection. It does not give the authority to search and seize them. The authority of the F.B.I., it seems to me, does not extend to taking matters that belong to a pri-

(Testimony of Lucien Smith Minor.)

vate party unlawfully and without a search warrant, as were several of these documents here in question.

Now in connection with our right to produce the evidence, if there is any doubt in your Honor's mind, I think both the Weeks case and the Gouled case will settle that in your Honor's mind, that at the time of trial we have the [138] right to take the evidence. We don't have to subpoena witnesses who are in court and under the Court's control and are here present. And we have a right to show by the evidence the unlawful seizure by any other witnesses that may be available.

The Court: You mean after it has already been passed on by a court?

Mr. Lavine: Yes. There are two times when it has to be passed on, your Honor.

The Court: I know, but I say after it has been passed on?

Mr. Lavine: Yes.

The Court: You have the right to open up the whole question again? That is your contention?

Mr. Lavine: Yes. If there is any question in your Honor's mind, if you will send for the Weeks case.

The Court: Your position is that you can come in first and fully argue the matter of suppression of evidence and have a decision by the Court, and then at the trial you again can have a rehearing of the entire matter?

(Testimony of Lucien Smith Minor.)

Mr. Lavine: That is right.

Mr. Maury: May I read into the record, your Honor, a certain excerpt from contract 83142, now being Government's Exhibit 3 in evidence? Reading from the third page thereof: "The accounts and records of the contractor shall be open at all times to the Government and its representatives." [139]

Mr. Lavine: Nothing there about seizing them.

Mr. Maury: Yes, sir. "The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government."

Now reading from the other contract, namely NXs 4105, which is now Government's Exhibit 4 in evidence, Article V: "The contractor shall keep records and books of account showing the cost of performing this contract."

Then it deals with the method of accounting.

Section B: "The contracting officer and his authorized representatives shall at all reasonable times have access to all records and books of account pertaining to this contract."

The contracting officer is defined above, as follows: "This contract, entered the 15th day of May, 1942, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this [140] contract——" That is the designation of the officer.

The Court: Well, I think Mr. Lavine is just pro-

(Testimony of Lucien Smith Minor.)

tecting his rights by keeping his record so that he isn't going to be foreclosed on his record.

The matter has been fully passed upon, as I read the files, by Judge Yankwich, and he suppressed certain checks the Government has seized, but did not grant all of the motion requested by the defendants, and the suppression of all of the evidence and the particular document that now is purported to be inquired about and offered was not suppressed by Judge Yankwich. The motion is overruled and exception is allowed to Mr. Zap.

Mr. Maury: Thank you, your Honor.

Mr. Lavine: Just a minute, Mr. Maury.

At this time the defendant Zap offers to prove by the witness Myerson that on or about November 5, 1942, in the offices of Edward F. Zap he took a certain check for $4,000 without any search warrant and that, further, he took certain check stubs which are here indicated; that at that time he had no search warrants for the taking of these particular documents; that his subsequent taking of various books, records and accounts was based upon a daily check and search and seizure of the premises of Mr. Zap while Mr. Zap was out of the city and not present, and that his subsequent seizure and taking of those documents to the office of the Federal Burea uof Investigation was based [141] upon that investigation and that search.

Mr. Maury: To which we object on the ground and for the reason that the check for $4,000 is al-

(Testimony of Lucien Smith Minor.)

ready in evidence, has been so admitted by the Court, without objection on the part of the defendant, yesterday, and is now the Government's Exhibit——

Mr. Lavine: I am coming to that, that check for $4,000, and at this time we move to strike from the evidence the check for $4,000 and have the jury instructed to disregard it as not properly in evidence in this case because it was unlawfully seized by the Government, without proper search warrant.

Mr. Maury: May I finish, please?

Mr. Lavine: Yes.

Mr. Maury (Continuing):——and is now the Government's Exhibit 7, in evidence; that the same was received by the Court yesterday in open court, before the Court and the jury in attendance; that no objection was made at the time of its being offered by the Government, and that no exception was taken to its admission in evidence; and that the offer of proof is also too late. It pertains to a matter which has become moot in so far as the check, Exhibit 7, is concerned, and that so far as the other matters therein contained are concerned, they are covered by the affidavit of Murray Myerson and Hilton Byers, and that the testimony would be a mere waste of the time of the Court and counsel [142] to make a record which is already before the Court and which has already been passed upon.

The Court: This $4,000 check, as I understand the record, was not one of those that Judge Yankwich suppressed.

(Testimony of Lucien Smith Minor.)

Mr. Maury: No, sir, it was not.

Mr. Lavine: No, your Honor.

Mr. Maury: The Government has not offered any of those checks which Judge Yankwich suppressed, and will not offer them, your Honor, during the course of this trial.

The Court: Now, Mr. Lavine has his offer of proof on there. His motion to strike will be denied.

Mr. Lavine: Exception noted. And the offer of proof, is that rejected?

The Court: Rejected.

Mr. Lavine: Exception noted.

And the right to call Mr. Myerson, as I understand, is refused?

The Court: Yes.

Mr. Lavine: And exception noted.

Mr. Maury: Let us reframe that. Is it the right to call Mr. Myerson that is rejected as a witness for the case in chief, or the right to call Mr. Myerson as a witness to testify to these ancillary matters?

Mr. Lavine: Yes, to the matter of the unlawful search and seizure.

The Court: Yes. Mr. Lavine I think made that clear; [143] that was the only reason he wanted to call him.

Mr. Lavine: Yes. Exception.

Mr. Maury: I just wanted the record perfectly straight.

(The following proceedings were in open court, in the hearing of the jury:)

(Testimony of Lucien Smith Minor.)

Mr. Binns: May I have this group of check stubs marked as Government's Exhibit next in order, for identification?

The Clerk: Government's Exhibit 32, for identification.

(The documents referred to were marked as Government's Exhibit No. 32, for identification.)

Witness Continues:

This book of check stubs marked Government's Exhibit 32, for identification, I have seen that before at Mr. Zap's office. It is Mr. Zap's book of check stubs. I visited the plant of Mr. Zap I would say on an average of once a week over a period of eight or ten months. Some investigation would be made practically every time I made a visit there, of certain items.

Q. Can you tell us on how many occasions you saw Government's Exhibit 32, for identification?

Mr. Lavine: Object to that as irrelevant, incompetent and immaterial.

The Court: Overruled.

The Witness: I would say approximately 20 to 25 times. I audited myself certain transactions, and under my direction [144] certain others were audited. The document identified as Government's Exhibit 32, for identification was one of the books that was used in conducting that audit. I have examined that check record.

By Mr. Binns: In order to ascertain the correct-

(Testimony of Lucien Smith Minor.)

ness of entries made in that check record to what document do you go?

Mr. Lavine: Object to that as irrelevant, incompetent and immaterial, too general.

The Court: Of course that is self-evidence; where did he go? Overruled.

The Witness: We would go to the cancelled checks. In connection with the cancelled checks, we examined the check stubs. The check stubs were contained in Government's Exhibit 32 for identification.

Mr. Binns: I again offer Government's Exhibit 32 in evidence, your Honor.

Mr. Lavine: Objected to as irrelevant, incompetent and immaterial, no proper foundation laid, your Honor.

The Witness: Government's Exhibit 32, for identification, was submitted to me for audit by Mr. Zap.

Mr. Binns: I again offer it in evidence, your Honor.

The Court: Admitted.

Q. By Mr. Lavine: Did Mr. Zap personally submit those books to you?

A. This particular book was submitted to me many times.

Q. Just a minute. You can answer that yes or no. [145] A. Yes.

Q. Did he submit that to you personally?

A. Yes.

Q. When?

(Testimony of Lucien Smith Minor.)

A. On several different occasions.

Mr. Lavine: That is all.

The Court: It is in evidence.

The Clerk: That will be Government's Exhibit 32, into evidence.

(The document heretofore marked for Identification as Government's Exhibit 32, was received in evidence.)

Cross Examination

By Mr. Lavine:

I have been in the Navy about 14 months. I came from civilian life. I am 27. Prior to coming into the Navy, I was an auditor for General Mills, Incorporated, out of Minneapolis. I entered the Navy as an ensign and have been in there the past 14 months. My first job was cost inspecting, and has been since that time. As a cost inspector I have, naturally, checked very carefully all the records and accounts of the various items that I was due to inspect.

I had a maximum of three auditors at Mr. Zap's place, I believe, at any one time; Mr. Balzer, Mr. Byers, and Mr. Watkins. Those were the most there at any one time. There were others; Mr. Combes at one time did some work on it. Mr. Zap's place was not a very large place. I don't know [146] that it was the smallest of the airplane manufacturers in this district. I would hate to hazard a guess as to the most number of employees it ever

(Testimony of Lucien Smith Minor.)

had there during the time that I was around there. I am not familiar with what he had at his plant. I would say a maximum of probably 100 were working there. I would guess the minimum down around 40. That may be off, but that is the best of my recollection of it. We started checking the Zap plant February 1942. Oh, the last time we were in there was the latter part of November, 1942. Now, in connection with this voucher summary of other direct charges—yes, Exhibit 20, the same exhibit. It is the next page in order, sheet No. 1. There is a signature of Edward F. Zap on the back of it, that is correct.

Then underneath that I have my certificate: "I hereby certify that I have examined every invoice or voucher pertaining to the charge listed on this summary or such invoices or vouchers have been examined by Navy employees under my supervision, and have found them to be correct charges to the Navy under contract 83142." I put that certificate on there. We examined that particular invoice, and at the time we thought it was correct. As to whether I personally examined it, I wouldn't say that I personally examined it at that time. I have since examined it. Either Mr. J. W. Combes or Hilton J. Byers examined it. I wouldn't say positively which of the two. I know an examination was made by a qualified Navy employee. [147]

The Court: Let us have no argument with the witness. He has answered your question very fairly,

(Testimony of Lucien Smith Minor.)

Then counsel comes back with an argument and then says "You don't know." He said it was either one of those. That is the answer, Mr. Lavine.

Mr. Lavine: That is your signature to that certification?

The Witness: That is correct.

Q. By Mr. Lavine: Now let us get back a little bit, Ensign Minor, to your system that was invoked in the Navy and particularly in that plant. First of all, before any charge was made on any cost-plus items, there was submitted to you or some man under your direction, a form, a request for inspection; isn't that correct?

The Witness: No that is not correct. We did have such a form C.A.S. 4, which had nothing whatever to do with the charges to the contract on Mr. Zap's general ledger. Looking at one of those C.A.S. forms, No. 4, that is one of the typical forms that were used at the Zap plant, and that was: "The following documents are submitted herewith for audit;" that is correct.

By Mr. Lavine: That was not merely a request for inspection of the item for approval: I have seen hundreds of them. One of these C.A.S. forms number 4 is typical of the forms that were used at the Zap plant. It contained the [148] heading "Navy Department, Materials Division, Contract Audit Section. Documents submitted for audit from the office of Edward F. Zap, name of contractor. To:

(Testimony of Lucien Smith Minor.)

Resident Auditor," and "the following documents are submitted herewith for audit."

On the books of the contractor he would check them up from there, list them on here, and transmit it to us with supporting documents on it.

In the case of certain types of charges, this was submitted to us for inspection; in the case of overhead, there is nothing whatever of that material submitted to us. In the case of all cost-plus items, that is in all estimated contracts and in all cases where there was a cost-plus item, there was no transmittal sheet whatever in the case of overhead expense, which is an element of a cost-plus item.

In the early stages of the audit we did not have that form or anything resembling it; we developed that form and requested that form and requested Mr. Zap to put it into use, approximately in June of 1942. We discussed it with both Mr. Zap and Mr. Champlin. Mr. Zap signed all the vouchers, and did not delegate that authority to anyone.

I think I know Mr. Champlin's title, of controller.

We audited Mr. Champlin's pay accounts; Mr. Champlin did sign some of these C-4 forms, but not nearly all of them. I did not review all of these forms personally. Champlin did not sign all those that I personally reviewed; nor do I [148-a] remember the exact percentage as to what he signed. I did not audit all the forms personally.

This C.A.S. 5 form which I am shown is a true

(Testimony of Lucien Smith Minor.)

and correct type and copy of C.A.S. 5 form with some items from the Zap factory on it. There was also a 4-A form, which was used to resubmit to us anything that we had previously suspended for lack of supporting data; that is if something was not approved by Navy cost inspectors they turned the matter back to the contractor and asked him to submit supporting documents and so forth.

After receiving C.A.S. 4 form, if we decided it should be approved, we prepared a form entitled C.A.S. 5 which would be cross-referenced to the C.A.S. 4 number. It would indicate on there of the total original C.A.S. 4 such and such an amount is approved; the 5-A also being cross-referenced to the original C.A.S. 4.

If these supporting documents came forward, then the contractor was permitted to submit to the Navy cost inspectors again a number 4-A form, which was for resubmittal. This form then received an audit by us in the same manner as the C.A.S. 4. It was audited in accordance with our auditing standards, and we and our inspectors were satisfied with it when we got the form back for final submission on the basis of the information then available. We then submitted the C.A.S. 5 forms to the contractor.

Q. By Mr. Lavine: You submitted a 5 to the contractor. [148-b] Then if you submitted a 5 to the contractor, then and after that the contractor was permitted to file a public voucher or public claim; isn't that correct?

(Testimony of Lucien Smith Minor.)

By the Witness: He did not. We made the voucher ourselves. He had previously submitted the document to us, and after we got the 5, that was a notification that we had temporarily approved that amount and would prepare a public voucher in payment thereof. We prepared the voucher. He had submitted all the invoices, the supporting documents to us, with the C.A.S.-4, or 4-A, as the case might be. [149]

Q. By Mr. Lavine: Now isn't it a fact that the form of claim to the United States is in the form here of Exhibit 19, for identification, and here is an item "Sold to United States of America, contract No. 83142. We charge your account with direct charges, as follows:" isn't that the form that the claim takes before it is paid and before you make out your voucher?

The Witness: In some cases, yes, in others, not. We did not require that certification——

After I prepare a C.5 form and approve of the item, then an invoice is actually prepared and billed to the Navy, that was the practice of Mr. Zap's organization. I think in most cases the invoice would accompany the 4 at the time it was first submitted.

I also had a C.5-A form. A C.5-A form was C.A.S. No. 5-A. That was a form that I used where there was a disallowance or a suspension. Well, it would depend, Mr. Lavine, on the type of charge. As I told you before, we didn't require Mr. Zap to make an invoice in all cases. In some cases the

(Testimony of Lucien Smith Minor.)

vendor's invoice constituted sufficient supporting data. But in every C.A.S. 4 there would be attached to that what Mr. Zap at that time thought was sufficient supporting data to justify payment of the claim then and there.

Mr. Lavine: In connection with these various items mentioned in this Exhibit No. 19; for instance, I note that there was a certification by Mr. Zap and also that it was taken [150] before Leona Hanley, a notary public. No. 19, now, your Honor, I was referring to.

The Court: All right.

Mr. Lavine: I will offer these forms, your Honor, No. 4, 4-A, 5 and 5-A, as Defendant's next in order.

The Clerk: That will be Defendants' Exhibit R.

(The documents referred to were marked as Defendants' Exhibit R, and were received in evidence.)

By Mr. Lavine:

The Witness: This item here of June 29, 1942, of Government's Exhibit 22, in itself does not contain our identification. It isn't the copy on which we predicated payment; I think it was an additional copy. I think this was submitted on a C-4 form which either I or one of my representatives reviewed, or audited; that is the one about which I told you some time ago. We went up to see Mr. Zap to discuss it. As I recall it was not approved in the manner in which it was originally submitted. We did not send it back on a C-5A form, but just held

(Testimony of Lucien Smith Minor.)

it up until Mr. Zap submitted additional data to us relative to the propriety of the claim. I believe we then gave him a 5 form, if that procedure was in effect at that time. We probably would if the procedure was in effect. This was just an informal notification, however. After that we prepared the voucher. I do not know who did the typing on this particular bill.

I have never seen Mr. Zap typewrite. I was around the [151] plant I would say approximately once a week over a period of eight or ten months. It would vary from a few minutes to maybe two hours. I don't think I ever spent as much as a day in the plant at a time. I don't recall any instance in which I ever did. I assigned some of my men to do certain work. I didn't police it as to just how many hours they would be there. They made reports but they didn't say how long it took them to check it.

In connection with this item for $500, I would say I had my conversation with Mr. Zap in the latter part of June 1942; that is from memory and it may be off two or three weeks; I think it was in the morning. We went up specifically to see about this particular item which we had questioned the propriety of. By "we" I mean Hilton J. Byars and I; I believe several of Mr. Zap's employees were around the office at the time, including Mr. Champlin, but I don't believe Miss Boyle was working for Mr. Zap then.

Mrs. Hanley was working at that time. I wouldn't

(Testimony of Lucien Smith Minor.)

say positively she was in the office on that occasion. I did not become particularly friendly with Mr. Champlin during the time that I was going over there. I don't think I have ever been out to lunch with him. I would say I haven't. I could be mistaken, but to my recollection I never recall having been to lunch with him. As to having any discussion with him about the auditing system over there, we discussed from time to time certain things we thought they should do to [151-a] improve the system. Certain of those improvements which I suggested were put into effect in the Zap plant. As a matter of fact, I saw Mr. Zap from time to time when I came in there. We discussed this C.A.S. 4 and 5-A system with Mr. Zap. He was very heartily in favor of it at the time.

Mr. Lavine: I would like to read, your Honor, from the Contract 13, 83142.

The Court: Proceed.

Mr. Lavine: Section 4 of the contract. "Compensation. The Government will pay the contractor for the items called for in Lot 1 upon the submission of properly certified invoices, or vouchers, the prices stipulated herein for articles delivered, accepted and services rendered, less deductions as herein provided.

"The Government agrees to pay the contractor for item 1 of lot 2 the true cost as determined by the Bureau of Supplies and Accounts, in accordance with the Treasury Depart-

(Testimony of Lucien Smith Minor)

ment decision 5000, published in Volume 5 of Federal Register, pages 2788, 2797, as amended by T. D., for the balance of the articles and services called for in lot 2 the Government will pay the contractor the true cost as determined by the Bureau of Supplies and Accounts in accordance with Treasury decision 5000 published in Volume 5 of Federal Register, pages 2788 and 2797, as amended by T. D., $3,400, plus a fixed fee amounting to $2,975. Should [152] the true cost of furnishing tools and wings lots 2, 3 and 4 exceed the sum of $59,500, the contractor would be paid a fee when it did not exceed $2,975, but should the true cost of the tools and wings be less than $59,500 the contractor shall be paid a fee amounting to $2,975, plus 50 per cent of the amount by which the cost of furnishing the tools and wings fell short of the estimated cost thereof; provided, however, that the total fee to be paid the contractor was not exceeding a total of 7 per cent of the underestimated cost of the tools and wings, $59,500. The contractor shall to the extent of its ability take all cash and trade discounts, rebates, allowances, credits, salvage values and bonifications available to the contractor, and if unable to take advantage of any such benefits it shall promptly notify the Department in writing to that effect, and the reason therefor; in determination of the cost of articles and materials, for the purpose of

(Testimony of Lucien Smith Minor.)

this contract there shall be deducted from the gross cost thereof all such cash trade discounts, rebates, allowances, credits, salvage, plus commissions and bonifications, which have accrued to the benefit of the contractor."

The Witness: Now, in connection with this contract, I think I am familiar with the contract. And in connection with the terms of this contract and the Navy procedure, even [153] after payments are made under a cost plus basis, as to whether there is a frequent re-auditing of the various accounts made, if we find evidence that some of the items we originally paid are incorrect in any manner whatever, we will audit to the extent of attempting to correct those items. We reaudited some of the items in the Zap concern, and then charged them back again as a reduction of some of the accounts still due Zap.

Q. By Mr. Lavine: And isn't it a fact, that under the terms of this contract that not only is a re-audit—not only are frequent provisions made for charging back of these items, or in any event even after all the items are completed, that the total—that you make an audit to see if any more than 7 per cent is paid?

The Witness: If it had been necessary to do so, we would have. In this particular case the actual cost was far in excess of the estimate, so there was no occasion to check that point. The actual cost exceeded the original estimate made on the cost plus fee items. That, therefore, of course, would not

(Testimony of Lucien Smith Minor.)

leave any 7 per cent, or in excess of 7 per cent profit. We issued instructions to Mr. Zap and his firm, that in the event of any conflicts over interpretation of any of the terms of the contract, or of any items, there was a remedy which he had to take. This is one set of instructions about the appeal. I think that Mr. Zap had still an additional copy of instructions relative to the appeal. I believe we [154] did formally transmit to him a copy of appeal instructions to show the exact procedure.

Mr. Lavine: We offer this as the defendant's next in order, your Honor.

The Clerk: Defendants' Exhibit S into evidence.

(The document referred to was marked Defendants' Exhibit S, read and received in evidence.)

Mr. Lavine: Now, just getting back—if they may do something—the ordinary procedure on a fixed price contract is to pay the price when the work is done; isn't that correct?

The Witness: If a contractor had a fixed price item—on which he was to receive a fixed and definite price, I would not be concerned with whether it cost him half that price, or twice as much as that price; no, I wouldn't say it is entirely correct. For this reason, the contracts are subject to renegotiation, as a general policy. We are required to make audits for the Renegotiation Board. We were required to report the cost of the fixed items to the Bureau.

(Testimony of Lucien Smith Minor.)

Q. By Mr. Lavine: Now, in connection with the fixed price if the contract began—if he—if it costs him $10 and the fixed price is $2,000, he still gets the $2,000, subject only to the 7 per cent negotiation on the present claims; isn't that right? [155]

A. I hardly think it would be, Mr. Lavine.

Q. Well, is it right or isn't it right?

A. Well, I would say it is not right and I would like to explain it.

Q. All right, go ahead.

A. Because if we take an instance so absurd as that, such a margin of profit, we would report it to the Bureau, recommending that payment be withheld until such time as an investigation could be made. I am sure they would institute an investigation and recommendation to not make any payment whatever until they ascertained the reason for it. That is my opinion of the fixed price contract: I know of some instances in which this occurred in this particular contract. If the fixed price ran to several thousand dollars more than the fixed price, the contractor, instead of losing, would have the right to present his case to the Bureau and request an adjustment. I didn't say definitely that the contractor would lose, Mr. Lavine, he always has the right to attempt to renegotiate himself. I think it would depend on renegotiation of the conditions and the matter. If justified, consideration would probably be given to the contractor's request. In other words, under the terms of item one of this contract, the contractor was only permitted to do

(Testimony of Lucien Smith Minor.)

that if there was a renegotiation. I don't believe the 7% limitation of profit related to the fixed priced items.

The Witness: I am familiar with T. D. 5000. I think this contract was subject to T. D. 5000 as amended, and the [155-a] amendment did away with the profit limitation provision, so the limitation was subject to the Re-negotiation Board, that would be the only way that would come into being, the amount of profit, and they have no fixed amount that will allow—that they will allow—they will allow reasonable.

Q. And for that reason all of the books and items would be subject to reauditing.

A. I think the Bureau would reserve the right to audit the records. I believe somewhere within seven years you have to reserve it. And a contractor has to keep the records for that period of time. I think he is required either to keep them or turn them over to an authorized Government representative.

STUART ELDRIDGE WEAVER, JR.,

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maury:

I live at 345 Berwick Street, West, Los Angeles. I was employed by the defendant, Edward F. Zap.

(Testimony of Stuart Eldridge Weaver, Jr.)

on September 25, 1942. I remained so employed until November 6, 1942. I remember a Saturday upon which Mr. Zap left town. I remember having a conversation with him about that time. It was in Mr. Zap's back offices of his place of business at 1005 Broxton Avenue, West Los Angeles. I said nothing. Mr. Zap called me to a meeting in which Mr. Champlin, Mr. Handley, Mr. Kern, [156] Mr. Batos, Mr. Zap and myself were present, and announced to the gathering that he was leaving town next day for Washington, and for possibly several weeks, and during his absence I was in charge of the business, acting as Mr. Zap's own representative. Mr. Champlin inquired as to whether this was only technical affairs or business affairs as well, and Mr. Zap replied this meant everything, business and technical, essentially that was all that was covered.

That meeting was called just prior to noon on Saturday and the regular working hours were 8 to 12 on Saturday, and the meeting terminated in the forenoon, and the meeting just broke up and everyone went home.

I returned to work the following Monday. I took charge of the place, technically speaking. I made no charges myself, no. That morning Mr. Champlin asked what I cared to do about charging the time on project 15, which was a cargo ship proposal. I asked him what he meant by me charging the time. He said there was no ledger account in

(Testimony of Stuart Eldridge Weaver, Jr.)

the book for that time worked, or that work on that project, and they would have to be allocated to one of the existing accounts. I asked how this had been handled in the past and he said Mr. Zap ordinarily made the allocations himself, or directed Mr. Brown, who was the accountant, to enter the charges on such and such an account.

Later that morning—this was October 19, 1942—[157] later that morning I gave Mr. Champlin written instructions that effective October 22nd, which was the Thursday of the beginning of a new pay week, he was to have a new ledger account opened and all the time charged thereafter on—all time worked thereafter on project 15 was to be charged to the new account number. I believe I retained a copy of that written order, although I haven't had time to find it at home yet. That account was set up on the books: I don't believe it was set up on exactly the date specified, but it was within a few days thereafter. I know it was in operation by October 25th.

Cross Examination

By Mr. Lavine:

When I came there I said Mr. Zap put me in charge of [157-a] the plant, told me I was going to be in charge, not in front of all the employees, no, only those I have named. As a pure estimate I would say there were perhaps 20 to 25 engineers, maybe he has about 10 clerical help and men in the loft, and I have no way of knowing how many were

(Testimony of Stuart Eldridge Weaver, Jr.)

there, because that was in another building. In other words, the staff organization constituted about 50 to 55 people.

When I came over to Mr. Zap's plant, I came there at a loss. I came to Mr. Zap because I had worked for him before and I felt my chances for advancement were better with the smaller organization where I was known to the men involved. I am working now at Northrop Aircraft. When I came to Mr. Zap's place and he turned the place over to me, he gave me no instructions whatsoever as to how to charge anything. He left it entirely up to me to handle. Mr. Champlin was the controller there at the time that I went in. Mr. Brown was handling the books and accounts when I was there. Entries in the books were made by Mr. Brown, who was, I believe—I believe Mr. Brown was a member of an outside auditing firm and simply employed by the Zap organization as a part time employee to make the entries in the books. Mr. Champlin made out the items of account.

In connection with Project No. 15, Mr. Zap never told me to make any charges on Project 15 in any way, shape or form. He never told me to enter them in any accounts, in any way, shape or form. After Mr. Zap announced that I was [158] to be in charge there, Mr. Zap then left for Washington the next day. The plane had gone on ahead, being flown across the country by Mr. Dale, and Mr. Zap was going east in order to be in Washington when the plane arrived there. Mr. Zap left Los Angeles

(Testimony of Stuart Eldridge Weaver, Jr.)

on Sunday, October 18, I believe, on Monday morning, October 19th, Mr. Champlin asked me to come out for a cup of coffee—pardon me—I am in error—first Mr. Champlin asked me what I cared to do about charging the time worked on Project 13.

Stuart Eldridge Weaver, Jr.,

called as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified further as follows:

Cross Examination
Resumed

By Mr. Lavine:

Q. Did Mr. Champlin and you have some difficulties over your draft status?

A. Slight difficulties, yes.

Q. Just state what occurred.

A. At my request, Mr. Champlin, shortly after Mr. Zap left, started to bring into the office the agents or representatives of the Government. Mr. Champlin made statements to me which I wanted to find out the truth of, which were derogatory to various employees, and derogatory to Mr. Zap.

Q. Did Mr. Champlin try to get you inducted into the [159] service so you would no longer be manager of the Zap organization, after Mr. Zap installed you?

(Objection by the Government sustained.)

The Witness: When I came in there as Manager of the company, Mr. Champlin had a typewriter; he

(Testimony of Stuart Eldridge Weaver, Jr.)

did typing. Miss Edwards was the telephone switchboard operator. I believe she did some typing. And Miss Boyle typed. The accounts were under the supervision of Mr. Brown. Miss Boyle helped him; perhaps. I knew Mr. Brown to be a certified public accountant. The last pay check was issued on October, the last Saturday or the last Friday in October, I forget the date. October 23rd or somewhere along there; that would be the next to the last Friday in October. Several of the employees stayed on after that without pay; most of them did.

Q. By Mr. Lavine: Did they write a letter expressing their confidence in Mr. Zap at that time?

Mr. Maury: Objected to as immaterial.

The Witness: I worked on Project 15 for a total of about four hours. This was during the daytime.

[160]

Los Angeles, California, Monday, April 12, 1943, 10:00 A. M.

LUCIEN SMITH MINOR,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Cross Examination

That is the bulletin I sent to Mr. Zap in connection with the manner of readjusting claims in which there had been a dispute between the cost inspector and the Government inspector and any contractor.

(Testimony of Lucien Smith Minor.)

It is the procedure to be followed on appealing to the Navy Department.

The Clerk: Defendants' Exhibit U in evidence.

(The document referred to was marked as DEFENDANTS' EXHIBIT U, and was received in evidence.)

"Office of the Cost Inspector
U. S. Navy
Douglas Aircraft Company, Inc.
9130 Wilshire Boulevard
Beverly Hills, California
31 July 1942

From: Cost Inspector.

To: Edward F. Zap, 1005 Broxton Avenue, West Los Angeles, Calif.

Subject: Procedure for Appeal and Review of Disallowed Items of Cost.

Reference: (a) Cost Inspection Bulletin Gen. 10-42, [161] L10-6/JJ/L4-3, (CIM), EN9-5. dated 12 May 1942.

Enclosure: (A) Copy of reference (a).

1. A copy of reference (a) is forwarded herewith for your information and guidance. In the event that you desire to protest any of the items disallowed by the Cost Inspector as an element of cost, it is requested that the procedure outlined therein be observed.

(Signed) L. S. MINOR
L. S. Minor
Ensign (SC) USNR"

(Testimony of Lucien Smith Minor.)

"Navy Department
Bureau of Supplies and Accounts
Washington, D. C.

12 May 1942

To: All Supervisory Cost Inspectors U. S. N.
All Cost Inspectors U S N

Cost Inspection Bulletin Gen 10-42

Subject: Procedure for appeal and review of disallowing items of cost.

Enclosure:

(A) Outline of Procedure for Appeal and Review Brief for Disallowed Items of Cost.

1. The procedure outlined in enclosure (A) should be adopted in any case where the contractor believes that [162] the Cost Inspector has erred in disallowing an item of cost and desires that an opinion relative thereto be rendered by the Cost Inspection Division, Bureau of Supplies and Accounts. In order that the proposed procedure may function effectively and the contractor be adequately informed with respect to the methods adopted for submitting a statement of facts for decision, the cost inspector is directed to discuss with the contractor the contests of this bulletin and perfect a procedure that will expedite the preparation and submission of briefs.

2. It is not intended that briefs be filed in the cases where the Cost Inspector and the

(Testimony of Lucien Smith Minor.)

contractor have not had a meeting of minds as to the statement of fact. Neither is it intended that items held in abeyance or suspended by the Cost Inspector for further consideration be the subject of an appeal. Only those items which have been considered and disallowed by the Cost Inspector and which in his opinion violate the terms of the contract or the cost principles applicable thereto should be appealed. It is therefore imperative that briefs be filed only if, as and when a fundamental difference cannot be settled amicably by the Cost Inspector and the Contractor. This does not mean, however, that the Cost Inspector should be lax in enforcing the contractual provisions as interpreted by the Cost Inspection Division [163] in determining the reimbursable items of cost.

3. No printed forms will be provided by the Cost Inspection Division for submitting briefs, although the form, including headings, indentations, and sectional divisions as indicated in enclosure (A) should be followed, using plain white paper, heavy for the original and thin for the copies.

4. Ordinarily a brief should contain only similar or identical principles requiring a decision; for example, allocating overhead cost items, pricing of raw materials, or composite depreciation rates should not be combined in one brief, because a decision in connection with

(Testimony of Lucien Smith Minor.)

overhead costs may be in favor of the contractor while the raw material pricing decision may sustain the Cost Inspector, and, since the principles are being interpreted, it does not appear advisable to attempt to make the brief a historical document or an All-inclusive Résumé of all items disallowed under a contract. It is therefore directed that each brief filed should contain only relevant items applicable to the principle involved.

5. This procedure should not prevent the usual exchange of correspondence with the Bureau in connection with interpretation of contractual provisions and other documents, including the Cost Inspection Manual.

6. Five official copies of the brief should be pre- [164] pared and distributed as follows:

Original and duplicate to Cost Inspection Division.

Triplicate to Cost Inspector.

Quadruplet to Contractor.

Quintuplicate to Supervisory Cost Inspector.

7. In the event of a decision by the Bureau, which is adverse to the contractor, the contractor has a right to appeal to the Compensation Board of the Navy Department for a review and hearing.

(Signed) FRANK BALDWIN

By direction of Paymaster General."

(Testimony of Lucien Smith Minor.)

Mr. Lavine: Attached to this are Appeal and Review Brief Forms, stating the manner in which all these items should be taken up, and the matters involved, the prices involved, and the question of disputes between the contractor, the Cost Inspector, supervisor cost inspector, and so forth, and provides any exhibits, and for a review of all those matters by supervisory officers, which is in evidence.

The Witness: The other day we went over all the C. A. S. 4 forms and each of these C. A. S. 4 forms have this substance in them. Form C. A. S. 4 on the top "Navy Department. Material Division. Contract Audit Section. Documents submitted for audit. From office of Edward F. Zap, name of contractor, to resident auditor, the following documents are submitted herewith for audit, list or number, the inspector, the number, the date, the vendor, the amount." [165] Below is a place for signature of the resident auditor, with reference to the amount, and so forth.

(The document referred to was received in evidence and marked Defendant's R.)

The Witness: When I got through submitting C-5 form to the contractor approving of certain things that I inspected, I would then, at a subsequent time, receive an invoice for that work. Not in all cases—for the reason that in—for certain types of charges the necessary invoice, and so forth, would, I believe, be submitted with the Form C.A.S. 4, that being the first. There was always an invoice

(Testimony of Lucien Smith Minor.)

with it, regardless of whether it was submitted with C.A.S. 4 or C.A.S. 5; either a vendor's invoice, or an invoice from Mr. Zap, something to support the charge.

There have been occasions where items have been allowed, and later on we made readjustment by charging it back to the contractor. I don't recall any, but probably there have been items of that type. And there is always a retention, a certain percentage of the money by the Government before final payment; not of his cost. A part of his fee is held up until after final acceptance, but his cost, no. I believe there is a part of his fee held up right now, pursuant to that regulation and general procedure.

When I went into Mr. Zap's office, he had a comptroller and a bookkeeper there handling the accounts and things. For a part of the time I believe that is the case. [166]

I know Cedric Brown, a certified public accountant. He helped to audit the books. I don't think he made out the bills. I think he only made up the statements at the end of the month. That is my recollection of his duties. I have seen him there on a number of occasions. I don't recall ever discussing any item in particular with Mr. Brown.

Cross Examination

By Mr. Balter:

This cost inspection service has been in effect, I believe, since July, 1940, when it was first placed

(Testimony of Lucien Smith Minor.)

into effect. That is approximately the same time that the cost plus fixed fee type of a contract went into effect. I think they actually started cost inspection in the field probably around July, 1940. As a matter of fact, most of the contracts in this area were fixed price contracts, until sometime in 1941. From what I have heard I think that is the case, though I don't know actually. And only until after sometime in 1941 did the Navy Department modify the situation so that there were some cost plus fixed fee items, and also some fixed price items in the same contract. Well, that is the only contract I have ever seen of that nature where one item was fixed price and one cost plus.

I am connected with the cost inspection service, which is a part of the Bureau of Supplies and Accounts of the Navy Department. There is a Bureau of Aeronautics in the Navy Department. The material inspectors and the inspectors such [167] as Lieutenant Commander Scott are under the jurisdiction of the Bureau of Aeronautics. He was not a part of the cost inspection service with which I am connected. As far as inspection services of a contractor are concerned, my duties and the duties of the materials inspector are, I think in many cases, quite similar. It is up to the technical inspector to see that it is in order to purchase that particular material for a contract, and it is acceptable as to quality, prices, and so forth, and if the cost audit did the invoice for the particular purchase,

(Testimony of Lucien Smith Minor.)

and it was approved by the cost inspectors, as being necessary, then we would audit it as to correctness of amounts, and so forth, and reallow it as costs.

We review the items and determine if they are eligible as an item of cost under the terms of the contract all the way through. By that I mean that we determine whether the contractor has expended the items which he claims he has expended in his application for payment; that is one step in it. The inspection services of the Bureau of Aeronautics are concerned with whether or not materials could be purchased under the contract, and then after their purchase whether or not the work is according to the specification and satisfactory; as to the reasonableness of prices.

I am primarily interested in the auditing phases of the contractor's books and his right to payment. On the question of determining whether or not the cost-plus items [168] of a contractor's transactions entitle him to payment, that is primarily my concern; I mean my service, though we rely on advice and assistance from the technical inspector in many, many cases. If a special type of work or test is being conducted under a particular contract, we would certainly rely on the technical inspector to say whether that is necessary and in order and in accordance with the contract.

For example, if they conducted a wind tunnel test we would certainly rely on the technical inspector to say whether a wind tunnel test was made under the contract. It is our concern to ascertain that

(Testimony of Lucien Smith Minor.)

the amount he charged us represented what he paid, though I think it is still the primary responsibility of the technical inspector to determine that the costs are reasonable. I think that is substantiated by directives issued by the various Bureaus. I do not have those directives with me. I think there are some available.

Now on the question of whether or not certain items should or should not be charged to a contract, it is true that there are many instances where a twilight zone of doubt exists as to whether items can or cannot be charged to a contract. Particularly in the field of whether or not items should be charged to the contract or be considered capitalization items. I don't think there are too many. I think the rules are pretty definite as to whether an item should be capitalized or charged to a contract. [169]

Q. By Mr. Balter: Where a contractor is engaged in experimental contracts and he has only a single contract, or only, say, one or two contracts, isn't it an important problem to determine whether or not a particular item shall be considered a part of the overhead charges for the contract, on a cost-plus fee basis particularly, or whether you would consider it as a capitalization charge?

The Witness: I don't think the fact that a contractor is having one contract would have any bearing on the case at all.

Q. Well, wouldn't it have a bearing on the situation where you had a contractor who had an as-

(Testimony of Lucien Smith Minor.)

sembly line production? Wouldn't it be much clearer than to determine whether or not items are chargeable to capitalization or to the contract than it would be in a case where a contractor has one or two contracts and doesn't anticipate other contracts and must buy certain things to keep his plant running, which may not very clearly be chargeable to the contract as it would be in a case of a contractor having many contracts?

The Witness: The test as to whether it is going to be capitalized or not should be the use for life of the particular item in question. That is a matter of interpretation; naturally, interpretation enters into it, but I think the regulations are reasonably definite on that score. Treasury Decision 5000 acts as our guide in many of those decisions. That was the original document on which the costs were to be [170] determined, but we have had literally dozens of directives supplementing, and in some cases superseding Treasury Decision 5000. The Comptroller General has issued others. The basic problem is still the same; that in many of those items it becomes a problem of interpretation which may not be ultimately decided by me at all; undoubtedly, yes. The procedure is set up so that they can appeal if they don't agree with us.

Q. And isn't it the experience of a great many of these war ~~contracts that~~ the door is left open for almost constant readjustment between the contractor and the Government from today on; isn't that correct?

(Testimony of Lucien Smith Minor.)

Mr. Binns: Your Honor, I object to that question.

The Court: Sustained.

Mr. Balter: Very well, I will withdraw the question.

The Witness: As to the fixed price items of a contract, it is a fact that concerns primarily engineering and drawing work in this particular contract: principally the items. That is true of both contracts. 83142 and 4105; I think that is generally what it covers. It is a fact that as far as engineering and drawing data is concerned the Bureau of Aeronautics receives all the drawings and all the engineering data and passes upon its correctness and its applicability under the contracts. They would, I believe, review the blueprint and determine whether it is applicable.

I don't know whether it is a fact that they receive all [171] the drawings and all the engineering data with respect to fixed price items on a contract: particularly these two contracts. That phase of it is not a concern of my inspection service; not as to the disposition of the blueprints. The correctness of the amounts charged to the fixed price items are a concern of ours, because we are required to report to the Bureau of Supplies and Accounts the actual cost of those fixed price items, the amount of profit the vendor made on them. Even on the fixed price items in contracts the Government is interested in determining whether or not the profit is too big or too small, definitely.

(Testimony of Lucien Smith Minor.)

Q. It is a fact that even in a fixed price item of a contract it's never really fixed?

A. There are statutes which provide for the renegotiation of fixed price contracts, if the amount of business which a contractor does with the Government exceeds, I believe, $100,000 a year; and if the Navy Department was so inclined I think they could renegotiate the contract.

I think Mr. Byars did confer with Mr. Butler, the engineer employed as a civilian engineer for the Materials Inspection Service, as far as the engineering data is concerned in these contracts, on several occasions. It is a fact that we also discussed those items with Mr. Hartman, a civilian inspector. Only when there seemed to be some question in our minds would we discuss it with Lieutenant Commander Scott.

Mr. Lavine: May I ask a few questions before the [172] Government resumes, your Honor?

The Court: All right.

Q. By Mr. Lavine: Referring now to Government's Exhibit 19, for identification, a public voucher No. 3062, an item "Preliminary Number, 40," an item for, $4,300, October, 1942," other direct charges, $4,300"; do you know the signature of Commander Smith? A. Yes, I do.

Q. Is that the signature of Commander G. A. Smith on there? A. Yes.

Q. "Commander, Retired, Naval Aircraft"?

A. "Inspector of Naval Aircraft".

(Testimony of Lucien Smith Minor.)

Q. "Commander, USN, Inspector of Naval Aircraft," is that correct? A. Yes.

Q. And is that your signature, "October 15, 1942, L. S. Minor, Ensign, USNR"; is that your signature? A. That is right.

Q. And you signed it on that day and date, did you, October 15, 1942? A. That is right.

Mr. Lavine: I will read that to the jury.

"I/we certify that the foregoing is the actual cost and that the services have been performed or material delivered in accordance with the contract. G. A. Smith, [173] Commander USN, Inspector Naval Aircraft; L. S. Minor, Ensign, USNR."

Q. By Mr. Lavine: Now in connection with voucher 280-B, "Preliminary Number, No. 1—" is that correct? A. That is right.

Q. Voucher dated——

Mr. Maury: Which exhibit is that?

Mr. Lavine: This is Government's Exhibit No. 30.

Q. By Mr. Lavine: Dated July 3, 1942, "contract NXs 4105, requisition No. 315-42." Then there shows on here, "General and Administrative Expenses." After that "Schedule C, $1,675.81." And below that, is that the signature of Commander Smith? A. It is.

Q. And is that your signature right next to it, on the other side of it? A. It is.

Q. Dated July 3, 1942, is that correct?

(Testimony of Lucien Smith Minor.)

A. That is right.

Mr. Lavine: "We certify that the foregoing is the actual cost and that the services have been performed or materials delivered in accordance with the contract."

Q. By Mr. Lavine: Now this schedule C which is referred to was attached at that time, was it? "Schedule of Direct Charges."

A. Yes, I think it was. [174]

THOMAS CEDRIC BROWNE.

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [175]

The Clerk: Your full name, please?

The Witness: Thomas Cedric Browne.

Direct Examination

By Mr. Maury:

I reside in Los Angeles. My place of business is in Santa Monica and Westwood Village. I am a certified public accountant. I am acquainted with Mr. E. F. Zap. During 1942 I had occasion to do some work for him. During the year 1942 I was in charge of the accounting work for Mr. E. F. Zap, and then I prepared financial statements, as is the usual thing, at the end of each month, and supervised the bookkeeping and accounting of his firm. I supervised all of them. That is, they were under my

(Testimony of Thomas Cedric Browne.)

direction. That is the setting up of the general ledger and the job cost ledgers, and so forth. They were under my supervision through the bookkeeper he had, in conjunction with his controller, Mr. Champlin. That was in connection with his business at 1005 Broxton Avenue.

The system that I set up was a job cost ledger system in connection with the contracts which he was doing for the United States Navy. In other words, we set up that job cost ledger system in order to conform with the various items of the contracts, to keep them segregated as we went along during the course of the work.

If I remember correctly, there were two contracts being worked on during 1942, contract 83142, and then a [176] contract known as NXs 4105.

Calling my attention to Government's Exhibits 4 and 3, these are the documents I have referred to. I am not too familiar with them, because of the fact that I was in charge of the accounting part of the work, and these contracts were referred to me just in order to determine the number of items and so forth in setting up the books. I never have read the complete contents of any of the contracts, naturally, and I just obtained the item numbers and the amounts from these contracts in order to set them up in the job cost ledger so that we would follow through the procedure that was necessary in keeping track of these costs between the Navy auditing department and the accounting department of E. F.

(Testimony of Thomas Cedric Browne.)

Zap. It was my view in the designing of this set of books to have them parallel or reflect items in those contracts. It was from those contracts that I evolved the system.

I came into the picture, you might say, in, roughly, November of 1941, when I was called in jointly by Mr. Zap and the Security-First National Bank of Los Angeles, for a balance sheet to be prepared at that time, inasmuch as that was the bank which was loaning him money from time to time, and they hadn't been able to secure a satisfactory financial statement for their purposes. So I came in at that time and went over the books and made an audit and prepared a financial statement for the bank. At that time I made certain recommendations. And then I was not called in again until the [177] end of the year, some time in January, to prepare Mr. Zap's income tax statements for 1941; and a little later on the accountant who had been in charge was dismissed, or left, I don't know just—wasn't in the picture any more, and I was called in then to prepare monthly financial statements, which I did during the months of January, February, March, April, May and June. That is all 1942. Those were a balance sheet and a profit and loss statement, as customary in any business.

Along about May, June or July, somewhere along in there, I would say about that time, the books had become so involved, so to speak; that is everything up until that time with regard to these contracts

(Testimony of Thomas Cedric Browne.)

was thrown into one account, both the income and the expenses, and there was no division as to whether they were fixed price divisions of the contract or cost plus, and it was pretty difficult, I am sure, for the Navy auditing department to try to make a reasonable audit of those particular accounts; therefore, Mr. Zap asked me if I would spend more time on this particular job than I had been; in other words, instead of coming in just at the end of the month he wanted me to come in periodically, as often as necessary in order to establish a more satisfactory system.

So it was then that I went down to the Navy auditing department and asked them along what lines would they want a system established which would give them more information in auditing these contracts, and in conferring with some of [178] the men in the Navy cost department we evolved this system of a job cost ledger which would give sufficient detailed construction of these accounts so that they coud be audited more easily. I numbered these accounts.

At that time we went back to, I believe, May 1st of 1942, and proceeded to break down the two accounts which were in the general ledger of these contracts into the various items of the contracts, and we called—I believe I am correct—we called Contract 83142, at the suggestion of one of the men in the Navy Department, job No. 25. It had previously been referred to as Job No. 90, I believe.

(Testimony of Thomas Cedric Browne.)

25. And then from that we went down the line and each item was 251, 252, 253, and so forth.

That is my present recollection as to Contract 83142.

Then I believe on NXs 4105, I think we gave that 26; and that was 261, 262, 263, and so forth.

I remember accounts commencing with the number 3. No. 3 was the one that we gave to 83142. 25 and 26 was NXs 4105; 25 being, I believe, the cost plus, and 26 the fixed price; or it might be vice versa. I am just talking from memory, of about 6 months back. You must realize I haven't seen the books or anything since last November.

Q. Calling your attention to this group of books and cancelled checks here which I now indicate, are these those books which you have described?

A. May I go down and take a look at them, sir?

[179]

Mr. Maury: Yes, surely.

Mr. Lavine: May we approach the bench?

Mr. Maury: Will you look them over while we are discussing the matters at the bench?

The Witness: Yes.

(Discussion outside hearing of the jury:)

Mr. Lavine: The Government is now coming to matters which we have heretofore, before Judge Yankwich, contended were unlawfully seized, without proper search warrant, and so that our record may be preserved and carried out, we at this time move the Court to suppress all of these forthcom-

(Testimony of Thomas Cedric Browne.)

ing documents and records, the checks, the books of account, and all records, as having been unlawfully seized, without authority, and in violation of the 4th and 5th amendments of the Constitution of the United States. That will save my repeating after each item as offered, and may I make that motion collectively as to all of these now being offered at this time and regarding which this auditor will be asked questions, so that my objections and my motion may be deemed as to all of these matters? And we ask at this time not only that they be suppressed but that they be returned to their owner, E. F. Zap.

The Court: I think it is advisable to approve Mr. Lavine's suggestion there, because I think it might be prejudicial for him to make that motion before the jury, and also to renew it after each one of these are offered, so [180] let the record show that the objection made by Mr. Lavine will follow each of the offers of the books and records and checks that the Government now proposes to be identified and offered in evidence through the witness who is now on the stand. The motion is overruled and the exception is allowed to the defendant Zap on each and every one of the exhibits that are about to be identified and offered in evidence. Is that satisfactory?

Mr. Maury: The Government has no objection to the procedure and wishes to stipulate thereto, and, of course, resists the substantive motion on the grounds heretofore set forth. [181]

(Testimony of Thomas Cedric Browne.)

Los Angeles, California, Monday, April 12, 1943.
2:00 P. M.

Thomas C. Browne,

called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Maury:

I have looked over these books and records.

Q. By Mr. Maury: Now, can you step down from the stand and you may come over here and explain to the jury, briefly, what each one of these is, if you know. Starting——

Mr. Lavine: All this testimony is subject to the general objection and exception.

Mr. Maury: Sure.

Q. By Mr. Maury: Starting here and going away down there. A. This is a check book.

Q. That is marked for identification on the front Exhibit 34 for identification. Explain what it is.

The Witness: It is the business check book of Mr. Edward F. Zap at the Security First National Bank of Los Angeles, in Westwood. The check stubs are numbered consecutively. They were originally issued by the bank, one, two and three, and 600 is the last number. Every one of these when drawn, the checks bear the same number. [182]

Exhibit 35 are bank statements of the account,

(Testimony of Thomas Cedric Browne.)

this account of Edward F. Zap at the First National Bank, Westwood. They were reconciled there by me or under my direction, to see that the reconciliation agreed with the general ledger.

The next exhibit of these here, entitled "group 36 for identification", are memoranda checks that were not drawn over here, but written on the same bank account.

This Exhibit 34 was written by Mr. Zap and each recorded at the end of the month when they came to the bank; he possibly didn't know about them until they were entered there at that time. That is the procedure on that type of checks.

This is 37; these here checks correspondingly numbered; that is, for instance, this check book, this one, these checks right here, 301 to 555 correspondingly numbered with the check book over here, in Exhibit 34.

These checks now numbered 2501 and go on through 28 and so on up, are the type of a check that we began in July, the first check was 611, July 15, 1942. This is what is called a voucher check, the bottom part of it being a description of what the check was written for, a copy of the check being attached to the invoice, and a third copy of the check being kept in numerical order in the files of Mr. Zap for the purpose of reconciling the bank account at the end of each month. They were on the same account, which is a change in the type of check in order to give us more adequate records.

(Testimony of Thomas Cedric Browne.)

They were reflected also by Exhibit 35, the bank statements. [183]

Now, this exhibit is a large book, marked 38 for identification. That is what you might call, what you do call, the book of original entry of all the transactions of Edward F. Zap in his business. Here is the cash received and that was entered in the cash deposited in the bank and credited to the particular account if they had been paid to Mr. Zap. The second tab is check record and into that was written the number of the check and the payee from these check stubs over here, corresponding with them. Indicating Exhibit 34.

Your next one is the invoice record, which is the usual type of record in which credits to the business for accounts payable are entered and they are charged, of course, on the account of the general ledger, or against the particular contract. The next tab is entitled payroll, and this was discontinued in the early part of 1942, because of the fact that we run the payroll then through this check record book here, along with all of the other checks. The last tab is the journal, which is the general journal for adjusting entries at the end of each month, or as time went on until the time any particular entry up here might not have been charged properly. This adjusting journal was used for that purpose.

"General Ledger," and marked 39 for identification, is the general ledger and is the book of final

(Testimony of Thomas Cedric Browne.)

entry from which the postings were made from these various journals in here, the cash received, check record, the invoice record, and the journal, when they were totalled up they were posted into [184] these accounts in here, in the general ledger of Mr. Zap. This is a ledger used in practically every business containing assets or liabilities, and no investment and revenue accounts, and the expense accounts to Edward F. Zap. The posting of that was made from 38 to 39, the original entry.

The next one, his red leather covered book which is marked Exhibit 40 for identification, is the payroll book in which we broke down the weekly payroll and charged it against the overhead accounts for the various job costs accounts before being totalled, and then being placed in the check record over here. This book was not made under my supervision and direction.

These entries were made, for instance, this particular writing—to June 12, 1942, is in the writing, I believe, of Mr. Champlin; that is prepared by him, this breakdown, and that was the basis on which he paid the employees.

Mr. Lavine: May I inquire?

The Court: Yes.

Q. By Mr. Lavine: Mr. Browne, Mr. Champlin didn't do that work under your direction, did he? He did that work but not under your direction?

A. Not under my direction. He knew that was the way in which I wanted it done, but he—because

(Testimony of Thomas Cedric Browne.)

when anything came up in bookkeeping, along that line, or the accounting line, the procedure, Mr. Champlin usually conferred with me as to how I would want that done so it will appear in the [185] final books of account.

Q. By Mr. Lavine: This was the system that was carried on in the Zap place of business?

A. That is correct.

Q. Mr. Zap personally did not directly issue the one check for $2,000, did he?

A. No, except that his signature was on the check.

Q. You handled all the accounts? You gave all the directions for the audit account; is that right?

A. Yes, sir.

The Court: All right. Proceed.

Q. By Mr. Maury: Now, calling your attention to the Government's Exhibit No. 41, I believe it is, for identification. Will you explain that to the Gentlemen of the Jury?

A. This is the job cost ledger which I tried or started to explain the first thing this morning, and got mixed up in my dates. It starts here and here it is out here in these indexed tabs 3 zero, 37, 38——

Q. Those account numbers?

A. Yes, they are account numbers. They were in the—had the same number on each of the files, and this is an identification of the previous breakdown, this here, they are intended to mean here various items in this particular contract so we might keep them all separate. Contract 83142, which was

(Testimony of Thomas Cedric Browne.)

entitled No. 3, and then zero 7, 8, 9, 10 and 15, corresponding to the different items appearing in that contract. [186]

And following that we have these, 261, 262, 263, 264 and 265, which are items of the contract NX-4105. In these particular instances the zero indicates the cost plus of the contract.

It is true also of the items under 83142.

This particular cost ledger does not have a name on the face of it, but is intended to be the cost plus portion of the contracts.

Exhibit 42, the job cost ledger, is under a fixed fee. That fixed fee could be fixed fee or price cost. It is referred to as one or the other.

In this ledger we have 2500, 2501, 2502 and 2503, which represents the items which are fixed price portions of the contract. The number in NX-4105 they used 25 as the beginning, you see, for the fixed price items; No. 26 for the cost plus items in the contract. Take here, we have No. 311, which is a fixed price portion of the contract 83142.

Exhibit 45 consists of various pages of original entry, similar to what there were that we find over in Exhibit 38. These were taken from this particular book when we had no previous use for them at that time; that is, they are of the previous years 1940 and 1941, so that when we came to 1942, it was no longer necessary to keep them, so we took them out and filed them here and continued the account of the 1942 records. [187]

(Testimony of Thomas Cedric Browne.)

In this book there is an account entitled Account No. 50-0. This account number, 50-0 refers to the payroll at the factory plant Mr. Zap had on Westwood Boulevard, that is, to the overhead payroll at that particular plant, to differentiate it from the ordinary office overhead at the main plant. That account was in here and apparently has been transferred by journal entry to the account designated 200 in Exhibit 30 for identification, which page is entitled "Factory Ledger Plant No. 2."

I made the journal entry with respect to that myself; here in the general ledger is where it is transferred; that is, account No. 11, Sheet 11, work-in-process charged to the general ledger. That was transferred out of 200 account in here in the general ledger, and this account here, you will observe it is made October 31. That was the last day of the financial statement and I believe it was the intention then to open up in one of our job cost ledgers on account entitled "50-0." That had not been done at that time. It shows in here in the column "50-0," not job cost ledger.

This journal entry on page 62, to which I have just referred, which is in my handwriting, was a transfer from what we called the factory ledger, which we were in the process of opening at that time, and under this direct account 200, into this work-in-process, so that we might have all the payroll under one control. [187-a]

What the factory overhead actually was, was 200-

(Testimony of Thomas Cedric Browne.)

50 and 200-51; I am a little musty of that, but those last figures were the account numbers for the overhead marks. Looking at this entry, I see October 23 says: "Project 75, 50-0, 1346," and on the 30th "Project 75, 15-0, 183." I now recall a conversation with Mr. Weaver.

Thus this was transferred into the 50-0 account from the account 200 by the journal entry, which I made.

This was then posted to the control account in the general ledger, but as of October 31, had never been put in the job cost ledger.

The new system of books which I mentioned was set up as of the accounting date of May 1, 1942: we break down our account as of April 30 and made this new set up on these particular sheets, which consisted of the job cost ledger and the job cost ledger fixed-fee.

In doing so we did not go back over the entire set of accounts under these two contracts and make all entries, let us say, backwards, or re-set them up: or re-break them down. We merely took the totals that were in the control account and broke them down as well as we were able to. Up to that time the contract 83142 had been one account, and we tried to analyze that and break it down into various items according to the contract by total, not by individual postings clear back.

Calling my attention to Government's Exhibit 34, or rather may I have the previous one—I think it is

(Testimony of Thomas Cedric Browne.)

32—yes, it is 32 for identification. This is a tab of stubs, [187-b] or bank check stubs, which preceded the Government's Exhibit 34 for identification.

Q. Now, let's turn to check No. 2679. I call your attention to Government's Exhibit 7 in evidence. Are you familiar with that check?

A. That appears on check record 58.

Q. Just a minute. Doesn't it appear on check record 57?

A. Let me see. Yes, it appears on check record 57, under the 2629.

Q. What is the date of that?

A. Well, between the 23rd and the 25th. There is the 23rd on the check and it would be in here, 23rd in here. In brackets afterwards in the—where you have it it says "see October."

Q. And then turn to "see October." Do you find it again?

A. Yes, it is the first check appearing on check record 58 in the amount of $4,000, from 2629, and under the date—it has 9-23, the same words as on the check.

Mr. Lavine: This particular item, the record shows particularly as to my special objection made yesterday——

The Court: Let the record so show. What is the number of it?

Mr. Maury: 2629, and the exhibit number is 7 in evidence. [188]

The Court: All right.

(Testimony of Thomas Cedric Browne.)

The Witness: That is made payable to William H. McAvoy and appears under 3-15, is the designated item of the job cost ledger.

Q. By Mr. Maury: Where does it go from there?

A. It goes into the job cost ledger under 3-15, page 1, and it appears under two datings, one of October 2nd and then followed by 9-23; William H. McAvoy, showing it came from check record 58; it appears under the other charges as a sub-head of direct charges on that particular page.

Q. Indicating that has been charged to account number what?

A. Account 315 of flight test portion of the contract 83142.

Q. Does that indicate whether these were reflected as paid by the Navy or not?

A. Yes, there is—this line drawn along here indicates it has been paid by the Navy, under the date paid.

Q. You have no independent recollection of this particular check, Mr. Browne?

A. In what way do you mean?

Q. Its issuance?

A. The reason for it being—well, this had been issued to Mr. Zap in blank, and that is the reason it was not entered until October, because until that time we didn't have the amount of the check. That is about the only thing. [189]

The Witness: I have been in the accounting busi-

(Testimony of Thomas Cedric Browne.)

ness over 16 years. I am a certified public accountant under the laws of the State of California.

I am familiar with Government's Exhibit No. 16 in evidence; one of those two documents was the original and the other is a duplicate of an invoice from the University of Washington for "work not previously billed, done up to and including July 31, 1942, in the wind tunnel." I have seen that before, approximately during the first ten days of September of 1942. To the best of my recollection, Mr. Zap gave them to me, and at that time I had a conversation with Mr. Zap. I asked Mr. Zap himself, what jobs this would be charged to and he said, "Well, just hold it in the file at the present time and we will decide later, because there are so many items on here it would take a little work in order to figure it out, which contract and jobs they were to be charged against."

I had another conversation with Mr. Zap regarding those, which was approximately September 17, 1942. I can refresh my memory of this by looking at the document of the invoice record in Mr. Zap's books, Exhibit 38 for identification, because of the fact on September 17th, I entered the invoice in there, having at that time secured from Mr. Zap the breakdown of the charges for this particular invoice.

Q. By "breakdown," what do you mean? [190]

A. I mean this was broken down into the two contracts, the NXs 4105 and 83142.

(Testimony of Thomas Cedric Browne.)

Q. You are indicating these figures on the bottom of the second page? A. Yes.

Q. In ink? On this exhibit, this Exhibit 16 is 16 in evidence. Do you know what this first column indicates?

A. The 3-0 on the top indicates this contract, 83142.

Q. And 200, the second column?

A. That indicates NXs 4105.

Q. Do you know whose handwriting this is?

A. To the best of my knowledge, that is Mr. Zap's.

Q. Whose handwriting is that?

A. The totals are my own handwriting. I totaled them on the machine.

Q. The second conversation—examine these—that Mr. Zap handed these to you? A. Yes.

Q. And that was in this form?

A. That is right.

Q. And did you adjust the books accordingly?

A. Yes, I put the entries through at that time, charged it corresponding with these two designations of the contract.

Mr. Maury: May the record show I now hand this and give it to the jury? [190-a]

The Court: Yes.

Q. By Mr. Maury: What did you do in here?

A. Oh, back over here?

Q. No, you had better stay over here.

(Testimony of Thomas Cedric Browne.)

A. That appears on the first line of IR 10, invoice record 10.

Q. That is Exhibit 38 for identification?

A. Yes. And appears in total over here in the invoice, $5,298.56, which is then charged to 3-0, in the amount of $3,385.94, and paid 260, in the amount of $1,962.

Q. And then from where did it go through?

A. Into the job cost ledger, under 3-0, we find the entry dated August 28th, University of Washington, in the amount of $3,385.94, under 3-0 of a contract, 83142. The balance of $1,962 appears under the—dated here September 30th, University of Washington, invoice record 10. The other one for $1,962, under 260, of the contract NXs 4105.

Q. That is still the cost-plus? A. Yes.

Q. A portion of that? A portion of that contract? A. Yes.

The Witness (continuing): An original entry in a set of books is an entry in a journal of some nature; in other words, we have here check record, cash receipt record, general [190-b] journal, and invoice record. That is what we call the books of original entry. And the first entries are put into that journal, to be later totaled and posted into a final book of entry, known as the general ledger, or subsidiary ledgers.

An original entry, for one thing, it reflects more detail concerning an entry, and usually more detail about it, than any other place in the books. It is entered from some form of document, you might call

(Testimony of Thomas Cedric Browne.)

it, such as an invoice, or a check, or a deposit slip to a bank; so, therefore, it indicates that there has been some document submitted for the purpose of making that original entry. It is put on the books, what you write on a check, the date of the check, or the invoice, or the deposit slip, which is the first place where you enter such transactions. The truth of an original entry depends upon the, you might say, what truth there is in the document from which you are making the entry.

The Court: You really mean accuracy, don't you?

The Witness: Accuracy, that is right. There are two things involved. There is the accuracy of the document, and then there is also the interpretation that the maker of the [190-c] entry places upon his reading of the document.

There are different types of documents, so one would be, I suppose, the record of the check, in the case of a check, and in the case of an invoice, that would depend upon the accuracy of the maker of the invoice. That is usually a payee and having nothing to do with that particular set of books; it is an outside creditor from whom you received the invoice. Of course, mainly as to amounts, dates, and totaling, and so forth, that is what I am talking about accuracy of the document.

If, then, the original entry is incorrect, for any reason whatsoever, all the following entries in the books will reflect that incorrection, unless subsequently discovered and changed by journal entry.

(Testimony of Thomas Cedric Browne.)

Otherwise, it would go all through the books as the original entry was made.

The Navy Control Account was a bank account which was opened up in the Security-First National Bank in the name of, I believe, E. F. Zap, Navy Control Account. It actually consisted of a loan from the United States Navy in advance against contract NXs-4105, the purpose being to secure considerable time for approval and final payment of various large items, and so as not to burden Mr. Zap with the necessity for too much outside finances to carry that contract.

The way it worked was that as soon as bills totaling fairly sizeable accounts, say a couple of thousand dollars, [191] or to payroll work, were shown to be due and payable by Mr. Zap immediately, by a checking of the particular totals usually by one of the Navy auditors, the loan could be made from the control account to Mr. Zap and Mr. Zap took care of these items and then subsequently to be sent to the Navy for repayment, and by the time they are paid by the Navy, the money would be back in the Navy control account, so it was sort of a revolving fund. That was another and separate account from the accounts to which the records pertained; it was simply an account for the contract NXs 4105.

The book shows that particular item, take $100 item, for example, was charged against a Navy contract on the books of Mr. Zap, and the amount was paid by Mr. Zap's bank account. Now, follow-

(Testimony of Thomas Cedric Browne.)

ing through on that, a bill would then be rendered to the United States Navy for reimbursement, the amount of which was charged against the Navy contract, and then the Navy contract, and then the Navy would pay that bill, which would reimburse Mr. Zap for the amount he originally put into that Navy contract. Mr. Zap paid the creditors.

Cross Examination

By Mr. Lavine:

Following that through just a moment to clarify that situation, the fact of the matter is that these various bills or items were paid by Mr. Zap, as I understand. It is true they were charged to Mr. Zap and paid by Mr. Zap. I [191-a] am the auditor and the one who instructed the Navy to be billed; to state the procedure for billing the Navy, that is what I mean. If I was billing the Navy, I would send in a hand written memorandum to the bookkeeper to make out a bill to the Navy, yes, not in every case, but I mean sometimes. Usually—I would just usually, by word of mouth, that particular item had been—was under the subject of payment by the Navy. If she sent in a bill and the Navy paid it, why then it was paid, but if the Navy didn't pay it, it was not paid of coarse. [191-b]

The bill between Mr. Zap and the Navy was then paid; it is correct; independently of that, and before that time, Mr. Zap made payments to the creditors for the amount that they billed. And as be-

(Testimony of Thomas Cedric Browne.)

tween the insurance companies on like flight tests, they were billed to Mr. Zap and not to the Navy. And it is correct they were paid by Mr. Zap and not by the Navy.

And as to expenses for the billing—rather the expenses for the pilot, and his living expenses, those were paid by Mr. Zap and not the Navy in the first instance. And as to personal expenses and cost of travel, those were paid by Mr. Zap, in the first instance. And as to the flight costs, and the flight tests, those were paid by Mr. Zap and not the Navy, in the first instance.

Mr. Maury: Are you also asking what the books show or what actually happened?

Mr. Lavine: I am asking what actually happened.

Mr. Maury: We object because the witness testified from the books.

The Court: This is cross examination. That is all right. He has a right to go a little further than you have on direct examination.

Q. By Mr. Lavine: But as far as any expenses for working men in the wind tunnel in the University of Washington, and for manpower, that was all charged to Mr. Zap directly, wasn't it? And paid by Mr. Zap, in the first instance?

The Witness: Yes, I guess so. Now, of course, that [192] particular item you are speaking of though—the only checks that appear for payment of power and wind tunnel tests are paid to Mr. Zap for reimbursement of something as paid, not on the

(Testimony of Thomas Cedric Browne.)

books directly to the account. Whatever those charges, or items, or expense, were, Mr. Zap paid them in the first instance. As far as any work done at the flight test field, the men who went up there and their expenses, those were paid by Mr. Zap directly in the first instance; that is correct as far as I know.

Of all those relationships that I am now referring to, was a relationship between Mr. Zap, as the contractor, and those particular persons with whom he had this business transaction; that is right. None of them were with the Navy.

When I came to Mr. Zap in the first instance, I had been recommended to him by the Security-First National Bank. When I was first called in, the first thing I was asked to do for Mr. Zap was to make up a financial statement as of October 31, 1941, which was to be submitted to the bank, and that is all that happened at that particular time. The only thing that happened at that time was I just made an audit of the books, prepared a financial statement so that the bank might have it. Nothing else happened at that particular time. That was November of 1941. I am not an employee of anybody. I became a certified accountant for E. F. Zap, aeronautical engineers; that is correct. The date of that, as I have previously outlined, I think, to the jury, as the scope of [193] my work, was in February of 1942. At that time I started to come in at the end of each month merely to close the books and prepare

(Testimony of Thomas Cedric Browne.)

a financial statement, and nothing else, and that was carried on for the next four or five months; that was the only thing I did.

As I remember, Mr. Zap called me in somewhere along in May or June and asked I spend more time on this particular job in order to expedite the money coming back from the Navy, because he was having considerable trouble at that time with a large number of bills that he had paid being held up for approval by the Navy auditors, so that he could receive reimbursement for them. He said substantially that he wanted me to set up a correct system that would meet with the approval of the Navy. That would probably be correct, because I conferred with the Navy after that as to what it was they required in order to—I went down and saw the Navy cost auditors at that time, and I asked them what would be a correct system to set up that would be—meet with their approval and be fully satisfactory in every respect.

Q. By Mr. Lavine: And they gave you a number of forms, didn't they, at that time? I will show you these. (Witness looks at forms.)

Now, I will ask you to look at those items and see if that is what was given to you by the Navy at that time as the proper forms and as an aid to you, to make out a complete new system, or a complete system of accounting and keeping [194] records?

The Witness: These—most of these—are ordinary forms used by the Douglas Aircraft Company, and

(Testimony of Thomas Cedric Browne.)

was, in the course of the conversation, they were handed to me, by the Navy. However, we didn't use any of these forms subsequently. The idea of the conversation was involving what type of a set of books we could use. You see, no forms were ever used between Mr. Zap and the Navy that came out of these at all. That is the idea of an accounting procedure to set up on his ledger job accounting. At any rate, I took these particular forms at that time. It wasn't until later that any particular forms were ever used. Those particular sheets that I have here are the result of my conference with the Navy, and in endeavoring to set up a new sysfem, or a better system, at the Zap factory. I used some of the wordings on them. I set up the headings, in the cost job ledger, just the words, nothing in the forms at all. It is partly in my handwriting and partly in one of the Navy auditor's handwriting. And, then after I set up our system, Mr. Harry Champlin did not follow the directions that I gave at that time as to various items of billing. He was acquainted with the job cost ledger to the effect that he knew what numbers designated certain items in the contracts, and that those were to be followed in designating the charges for checks and for invoices.

I sent a letter of April 29, 1942, to Mr. Zap, together with a statement there; yes. [195]

There were times when items were charged as fixed fee items, which were not, for cost-plus, and vice versa; that could happen, yes. As a matter of

(Testimony of Thomas Cedric Browne.)

fact, it did happen, and I discovered it myself as an error in connection with matters in connection with the various contracts that Mr. Zap had; from time to time that would happen, yes.

Mr. Zap did work on contracts prior to the letting of the contracts. He did experiment—this is more or less hearsay, I must say; I know that in order to obtain contracts from the Navy preliminary work has to be done to secure the contracts. That is the only thing I know that might you would say, work was done prior to obtaining the contracts which had a direct bearing on the contract.

Q. By Mr. Lavine: I show you here a recapitulation of accounts of Mr. Zap and anticipated future accounts.

The Witness: I think this was made up by Mr. Zap prior to one of his trips to Washington to indicate to the Navy and Bureau of Aeronautics some of the scope of work that had been done—was being done and would be done in the future. This is not an audit. This is merely making up of some figures. They are available or in the books. And it is not anything that is due from the Navy. It is merely an estimated figure for use by Mr. Zap in conference with the Navy. That was a recapitulation of his contracts and his anticipated contracts. You see, in these contracts there are total figures given on this here, rather than to go through the whole papers. [196]

(Testimony of Thomas Cedric Browne.)

Mr. Lavine: I offer this in evidence as Defendants' next in order.

The Clerk: Defendants' Exhibit V, into evidence.

(The document referred to was marked DEFENDANTS' EXHIBIT V and received in evidence.)

Mr. Lavine:

"RECAPITULATION OF ACCEPTED CONTRACTS, ANTICIPATED FUTURE CONTRACTS, AND PROPOSALS BY BUREAU OF AERONAUTICS (U. S. NAVY) FOR ADDITIONAL WORK.

Contracts (Completed and in Process)—Schedule I	$ 739,100.00
Anticipated Future Contracts—Schedule II	257,800.00
Proposals by Bureau of Aeronautics, U. S. Navy—Schedule III	225,000.00
	$1,221,900.00

Contract No. or Description	Original Contract Estimates	Actual Cost Due to Sub-contracting	Percentage of Completion
C-69372	$ 22,500.00	$ 24,500.00	100.00%
C-75017	75,900.00	200,000.00	95.00%
C-75020	5,500.00	5,500.00	100.00%
C-74237	22,500.00	22,500.00	100.00%
C-83142	107,000.00	250,000.00	95.00%
C-86621	11,600.00	11,600.00	100.00%
Grumman Proposal	225,000.00	225,000.00	5.00%

I guess that is all that is important at this time.

(Testimony of Thomas Cedric Browne:)

"DETAIL OF ANTICIPATED FUTURE CONTRACTS BASED ON WORK COMPLETED IN PRIOR CONTRACT. [197]

Flight Testing on Completion of C-83142	$ 11,000.00
Additional rework on C-75017; proposal stage-accepted	16,800.00
Negotiation with Consolidated to apply Zap Flaps to B24 Bomber. Study now in progress. Engineering data $10,000.00	230,000.00"

The next page relates to "Proposals by Bureau of Aeronautics, United States Navy":

"#1—Development of an automatic blow-back feature	
Estimated Contract Price	$75,000.00
#2—Investigation of duplex roll-out type aileron	
Estimated Contract Price	75,000.00
#3—Investigation of flat-type full span flap	
Estimated Contract Price	75,000.00"

Now, Mr. Browne, I will show you a letter dated June 4, 1942, and ask you if you addressed that to Mr. Zap. A. Yes, I did.

Q. Is this a typical letter that you addressed to him on the completion of all of your audits at different periods of time?

A. It is a typical letter, but I didn't give him a letter every time we completed any financial statement. It was just from time to time, when he would be going to Wash- [198] ington or some place. Where he required additional information other than a balance sheet and a profit and loss statement, I would furnish him with other schedules taken

(Testimony of Thomas Cedric Browne.)

from the books showing a detailed breakdown which would be a little more than what you have on just the profit and loss statement and the balance sheet. In other words, they accompanied the balance sheet and the profit and loss statement, showing the detail that might be needed, rather than taking a set of books along with you.

Mr. Lavine: I offer this in evidence as defendants' next in order.

"Mr. Edward F. Zap, 1005 Broxton,
Los Angeles, Calif. June 4, 1942.
Dear Mr. Zap:

In accordance with your request we have recently completed an audit of your books and financial records, the results of this audit being as follows: a recapitulation of contracts with the United States Navy——"

and the rest relates to balance sheets of 1941, which I am not concerned about.

"All of the enclosed exhibits and schedules were prepared after a very complete examination of your records.

I hereby certify that to the best of my knowledge and belief the accompanying recapitulation of contracts is correct; that the balance sheet represents a true [199] statement of your financial conditions as of November 31, 1941; that the accompanying statement of profit and loss truly reflects the results of your financial operations for the past year, and that the recapitu-

(Testimony of Thomas Cedric Browne.)

lation of expenses on the Grumman F4 has been prepared from the actual figures disclosed in your general ledger."

Signed "Harry L. Nourse Auditing Company, by——"

You signed that, didn't you?

The Witness: That is right. In addition to Mr. Champlin being at Mr. Zap's place, there was also a bookkeeper named Ethel Boyle. I would write out a pencil memorandum of how certain things should be made out, and then she would type them and send them in quite fre[illegible]tly. That was the practice.

I am familiar wi[illegible] Form C.A.S. 4 and with C.A.S. 4-(A), and C.A.S. 5, and C.A.S. 5-(A). They were started by Mr. Quint, of the Navy Audit. I mean I don't know quite his official capacity with the Navy Audit, but those were forms which he used in his expediting the audit for the Navy with the Douglas Aircraft Company. As a matter of fact, they are exactly similar, except for the fact E. F. Zap appears where Douglas Aircraft formerly appeared. And when he came down to confer with me regarding the manner of sending in items for audit to the Navy, he suggested that we use these forms, and so we had mimeographed forms made up from the forms which he gave us—I mean the Zap Company did. [200]

That was done by me or under my direction; I just turned them over to Mr. Champlin and he had one of the girls in the office make them up. That is

(Testimony of Thomas Cedric Browne.)

when that came into effect, and what they were, as I say, was a duplication of the same type of forms which the Navy audit used with other companies. Then after the item would be submitted for inspection on a C.A.S. 4 form, the Navy Audit would inspect it and audit it, and send it back to me. If they approved it, then they sent me form C.A.S. 5; if they disapproved it, they sent form C.A.S. 5-(A). Then if they sent back a form C.A.S. 5, I made a notation on it with a direction to make out a bill for that amount. We didn't usually make up a bill just for one C.A.S. 5, but when we had an accumulation of them that amounted to $1,000 or $1,500, or something like that, then an invoice would be made up covering so many C.A.S. 5's. Then I would make out an invoice and bill that to the Navy. I would call that an invoice; I would label it an invoice.

Now those invoices were made up pursuant to notations that I made out, or oral instructions that I gave. When we had so many C.A.S. 5's back from the Navy saying they had been approved for payment, then the usual procedure was just to send back an invoice asking for payment at that time.

Q. I ask you to look at this document. Is that in your own handwriting? A. Yes, it is.

Q. And is that an item that you made out at the time [201] that you were filling out what the charges should be or how the Navy should be charged for the flight tests?

A. It's a chart of accounts, you might call it, in

(Testimony of Thomas Cedric Browne.)

the job cost ledger, and we had these designations of 3-10, 3-15, -25 and -26, corresponding to those numbers in there, and then afterwards I had these notations and had a few copies of these made up so that Miss Boyle and everyone in the office would be familiar with these, so they would not have to go to the books every time they wanted to find out, for instance, what 25-3 for instance, meant; it meant a flight test, contract NXs 4105. It was just a type, so that they would know what it referred to when they saw a check come through which had that designation on it, they would know that was the part of the contract to which it referred. Or if the engineers would see that this particular——

Q. By Mr. Lavine: Now, Mr. Browne, I show you the second item on that list there, "3-15, Flight test, Contract NXs 4105." The first item there listed is "3-10, manufacture and test for static tests"; then you have under that "Contract 83142, fixed fee basis, 3-15, flight test." Was that made in your handwriting? A. Yes, it was.

Mr. Lavine: I now offer this in evidence as defendants' next in order.

Mr. Maury: May I take the witness on voir dire, your Honor? [202]

The Court: Yes.

Q. By Mr. Maury: Who erased "cost plus" and put in "fixed fee" in this second line here, where it says "Contract 83142, fixed fee basis"?

(Testimony of Thomas Cedric Browne.)

You can see through the page there has been an erasure and it originally said "cost plus."

A. Yes. I originally made that up "cost plus," and Mr. Champlin stated that wasn't correct according to the contract and it shoud be "fixed fee basis," and we erased that to make it "fixed fee basis," and from that was made the chart of accounts.

The Court: That answers it.

Q. By Mr. Maury: And you erased that and put it in under fixed fee rather than cost plus then?

A. That is right.

Q. When was that made, that directive?

A. That would be rather hard to say, because all it was was just a memorandum. I would say it was about the time of the completion, if you can tell from the books, of items 3-7, -8 and -9. That would probably be after the last dates on that, because of the fact that it does not show those items on there; it starts with 3-10, which would infer that. There is only one thing about this. This says page 2 on it. Where is page 1? So that apparently that is just a complete breakdown of the job cost ledger.

Q. Can you tell, then, whether or not after that was made up and given to the employees, charges under account [203] 3-15, which, as I understand it, was the flight test, were posted into the fixed fee ledger, rather than the cost plus ledger?

A. They were posted into the cost plus ledger, because 3-15 appears in the cost plus ledger.

(Testimony of Thomas Cedric Browne.)

Q. Yes, sir, and does not appear in the fixed fee ledger?

Mr. Lavine: I object to his cross examining in the middle of my cross examination.

The Clerk: That would be Defendants' Exhibit W, into evidence.

(The document referred to was marked Defendants' Exhibit W, and received in evidence.)

The Witness: I had several of these typewritten up at that time and distributed to the various employees at the Zap place; two or three of them, as directions. Mr. Champlin made out most of the C.A.S. 4 forms. He signed all of the C.A.S. 4 forms. They were made out under his direction by Miss Boyle; or could be made out under my direction. He signed all of them. Miss Boyle made out the invoices. Of course, before she was there—any girl that could run a typewriter could make them out, because the C.A.S. 5's had the contract number on them, so it was merely a recapitulation of the C.A.S. 5's. Mr. Champlin had a typewriter of his own in his office, and he made out, no, I wouldn't say that he did—any typewriter in the office could make that [204] material or typewrite that material for the Ditto machine.

Showing me here a recapitulation of information contained in contract No. NXs 4105—Grumman F4-F, dated May 15, 1942, I probably made it up in conference with Mr. Champlin, because he was

(Testimony of Thomas Cedric Browne.)

the one who read all contracts and gave me the accounting data from them. In other words, I was the one who would suggest the numbers to be charged for the items; he would give me the information to put in here. I made this up, then, from that and had it distributed, to just those who were in charge of anything regarding bookkeeping or accounting in the organization.

Mr. Lavine: I offer this as defendants' next in order.

Mr. Maury: May I take the witness on voir dire, your Honor?

The Court: Yes.

Q. By Mr. Maury: As I understand it, this is under contract NXs 4105. I observe here an item designated "Flight test," and the item is apparently numbered 25-3, and it's listed as a fixed fee. Now, that, of course, is pertinent only to the contract NXs 4105?

The Court: It is in evidence.

The Clerk: Defendants' Exhibit X, into evidence.

(The document referred to was marked DEFENDANTS' EXHIBIT X, and received in evidence.)

Mr. Lavine: I am reading from this duplicate copy, to save time, if it is agreeable. [205]

(Testimony of Thomas Cedric Browne.)

Items	LOT 1	
25-1	Design Data & Drawings	Fixed Fee
25-2	Tool Design	Fixed Fee
25-3	Flight Test	Fixed Fee
25-4	Flight Test Report	Fixed Fee
25-5	Final Corrected Information and Drawings	Fixed Fee
	LOT 2	
26-1	Tests & Miscellaneous Data	Cost Plus
26-2	Lofting and Tool and Template Construction	Cost Plus
26-3	Construction for Static Tests	Cost Plus
26-4	Construction of Plane	
26-5	Fixed Fee on Completion of Contract—No Cost	$2,975.00

1. Cost Plus items to be repaid semi-monthly under terms of contract.
2. Fixed fee of $2,975.00 shall be made as follows:
   A. 25% when 25% work completed.
   B. Additional 25% when 50% work completed.
   C. Additional 25% when 75% work completed.
   D. Balance on completion of contract work under Lot 2.
3. For insurance purposes, plane is valued at $50,000.00.

JOB #25

Lot 1"

I am going to skip various items. [206]

"Flight Test		Fixed Fee
Flight Test Report		Fixed Fee
Final Corrected Information and Drawings		Fixed Fee"

Then Job No. 3:

"Construction and Incorporation of Revised Tail with Drawings	$ 6,745.00
Construction and Incorporation of Revised Folding Hinged Wing	26,750.00
Tooling, Lofting, Tool Design, Templates	16,000.00
Manufacture and Test for Static Test	28,500.00
Flight Test"	

(Testimony of Thomas Cedric Browne.)

That is the copy. Now, Mr. Browne, in connection with the work at Mr. Zap's place there you went over there quite frequently, didn't you?

The Witness: Yes. I can't recall that I ever saw Mr. Zap typewrite. In connection with Mr. Champlin's work there, I have identified a large number of documents here that Champlin wrote out in his own handwriting. He made original entries in the ledger in his own handwriting. While I was in Mr. Zap's place there, I had occasion to observe Mr. Champlin's desk because sometimes I worked at it. It is true I had difficulty finding papers. Papers were on frequent occasions in the desk or lost there that a considerable search had to be made for them. Bills were delayed somewhat sometimes that hadn't been turned over to me for [207] inspection or audit.

A pretty full set of books were being kept under my direction there at that time, after I became in charge. Not necessarily whenever any of the employees had any doubts as to what to do did they come to me and ask me what the thing was to do. Miss Boyle, on frequent occasions asked me, on procedure. Yes, certainly. Mr. Champlin asked me what to do on procedure. Mr. Zap never asked me at any time to juggle any accounts. He never asked me to make any erroneous entries or change any entries around. He never asked me to engage with him in any scheme or trick or device to enter entries into any records that would falsely reflect the books of

(Testimony of Thomas Cedric Browne.)

the Zap Corporation. He never at any time in connection with any of these items asked me to charge one item to one account that I knew should be charged to some other account.

Redirect Examination

By Mr. Maury:

The Witness: There is an item here on the invoice record of that set of books, indicating that insurance was paid upon Mr. William McAvoy, a test pilot employed during September and October of 1942, under contract 83142. It indicates, on invoice record 11, Harry H. Kamm and Co. Ltd., in the amount of $135, which would probably have to be verified by the invoice itself from the insurance company; Harry H. Kamm and Company is an insurance company. It was charged [208] to Mr. Zap's personal account. This item was paid on October 10 by Mr. Zap, by check No. 2743, which appears on check record page No. 59. These books show an item paid to Mr. McAvoy under account 3-15, in the sum of $4,000 on September 23, 1942. I believe that is the only item appearing in the books made out directly to William H. McAvoy, that one check in the total of $4,000. In making an audit of these books, I never did ask Mr. McAvoy how much he received.

Check No. 384, which shows on check record 47, shows in the books that it was dated the 8th of May; the amount of $800.00; the item is reimbursement E. F. Zap account, wind tunnel tests, design infor-

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(Testimony of Thomas Cedric Browne.)

nation, job 26-1; check No. 2502 in the sum of $1,000, dated July 15, 1942, made payable to E. F. Zap, for wind tunnel expenses.

As a part of Exhibit 6 in evidence, the certificate of E. F. Zap concerning check No. 360 was read.

I made a continuous audit of Mr. Zap's books from the end of 1941, so I would say we had monthly audits.

I did not check outside of the books, nor did I go outside the books to creditors, except when I made up the statement as of October 31, 1941, to ascertain whether the amounts shown owing on the books were correct and agreed with amounts shown on the books of creditors.

I never did go to the creditors to find out whether they had been paid, during the entire course of my work there, un- [209] less there would be a disagreement between a statement they sent and the books as to a payment which I might have showed and then I would confer with them by letter.

I never did check to determine whether the work charged on these books of Mr. Zap's was actually done under the contracts to which it was charged; I could not do so for the reason that the work being done was engineering and being put on graphs, and that sort of thing, and I couldn't tell what contract it referred to in any manner whatever because it was just engineering work on paper, and I couldn't tell from an examination of that what particular contract it referred to. An engineer would have to do it,

(Testimony of Thomas Cedric Browne.)

Recross Examination

By Mr. Lavine:

I said I am not familiar with engineering terms and engineering data; and when I made out these bills or told the girl there to make out the bill, I would make it out under such appropriate title or under such appropriate language as I thought was applicable. I am speaking of invoices now, to the Navy.

Coming back to the C.A.S. forms, when I made those out I simply made them out showing the date and the name of the payee and the amount. That is the only thing that was required by the Navy. We just showed the items, the contract against which if was charged, and then it would be subsequently audited by the Navy to determine whether that was correct. The language or expression in the invoice came from the [210] creditor, so that invoice reflected what the creditor had done for Mr. Zap.

I had a conversation with Mr. Zap just before he went to Washington, in October of 1942, with relation to discharging Mr. Champlin. Well, if you want to state it in words used, he asked me if he should fire Mr. Champlin, and I said no. I further stated if he was going to do that at that time he should wait until he came back from Washington. I did not advise him either one way or the other.

(Testimony of Thomas Cedric Browne.)

Redirect Examination

By Mr. Maury:

Witness: This thousand dollar item of July 15, 1942, which I stated had not been charged to the Navy, meant that that had never appeared on a direct charge to the Navy for reimbursement. Whether or not that was paid through the Navy Control Account would not appear on these books, but upon a memorandum of the running costs of this particular contract, so that we would know what the total cost had been to date for application for an advance from the Navy Control Account. These books then do not show whether that thousand dollars had or had not been charged to the Navy. These books show that about $30,000 was advanced during the early stages of the contract from the Navy Control Account. It would require an examination of other documents to determine whether this thousand dollars was included in that $30,000.

I had a conversation with Mr. Zap concerning that par- [211] ticular charge. This was about the time of the receipt of the invoice from the University of Washington, about the first week in September. That was Exhibit 16, the statement of the University of Washington which we discussed. The conversation was in Mr. Zap's office.

I asked Mr. Zap whether this thousand dollar item represented a direct payment to the University of Washington, which should have been shown on that particular statement for $5,000; in other words,

(Testimony of Thomas Cedric Browne.)

whether the bill should have been $6,000, with a thousand dollar credit shown, or whether the $6,000 was the total charge and there should have been a credit for the thousand dollars; whether there was a direct connection between this $5,000 bill and the thousand dollar item, in determining the correct procedure in my accounts payable.

I had another later conversation with Mr. Zap concerning this same bill from the University of Washington in which Mr. Zap told me the thousand dollars was for wind tunnel experiments for additional cost of the experiments, besides the $5,000 on the invoice.

Recross Examination

By Mr. Lavine:

By the Witness: The first conversation I had with Mr. Zap was about the first week in September in his office. The conversation was merely that I asked him for an allocation of this $5,000 invoice as to contracts and he informed [211-a] he would give it to me later. Approximately ten days passed between the first conversation and the second one, and then I asked him a second time to give me an allocation. Zap said the thousand dollar reimbursements were additional expenses besides those shown on the invoice. [211-b]

HAROLD E. DALE,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Binns:

Q. Where do you live, Mr. Dale?

A. I live at 935 13th Street, Hermosa Beach, California. I work at Northrop Aircraft Company, Hawthorne. I started to work for Mr. Zap on December 9, 1940. When I first went there I was a designer, aeronautical engineer. I received a promotion. On January 1, 1942, I was made assistant chief engineer, and approximately five or six months after that date I was made chief engineer. I terminated there approximately November 25, 1942.

My duties were more or less the coordination of the structural design of the contracts that he had, rendering them into drawings, making drawings, and to coordinating the stress analysis with the drawings in order to construct the planes called for and the parts called for in his contract. Previous to my appointment as assistant chief engineer I made a series of drawings that were called Project 15. It was to be a cargo plane, or a bomber—some sort like that. It was to be a very large plane, about 150 foot wing spread. It was just a very preliminary design, more or less study at the time I worked on it. I cannot tell the exact date, but I would estimate that was some time around October, 1941.

[212]

(Testimony of Harold E. Dale.)

After I made those drawings work continued in the aerodynamics department right on through, up until we terminated—until I terminated, in November, 1942. There was a wind tunnel model constructed of that plane. Wind tunnel tests were conducted.

Mr. Dale. I wrote this letter, marked

GOVERNMENT'S EXHIBIT 46,

for identification. I sent that letter to Mr. Zap.

The Court: It will be admitted.

Mr. Binns:

"January 8, 1942.

Mr. E. F. Zap
T.W.A. Passenger Office,
Dayton, Ohio.

Dear Ed:

Enclosed is the preliminary estimate of time involved for Project No. 15. This has been prepared by us on the basis of past experiences and checking upon current contracts. It is accurate as we see it, neither conservative nor optimistic. I have herewith taken the liberty to summarize the probable cost of this project for one experimental airplane. This cost would cover production, engineering and tooling.

(1) Total engineering, 160,000 hours, $3	$481,800.
(2) Total tooling and manufacturing, 147,000 hours, $2	$294,000.
(3) Materials	$ 98,000.
Total	$873,800.

(Testimony of Harold E. Dale.)

The above does not include insurance, over-[213] heads, flight test expenses, government furnished materials such as engines, props, etc., or miscellaneous items.

Wishing your every success,

HAROLD DALE."

May the record show that Government's Exhibit 46 is being passed to the jury?

By the Witness:

This drawing marked Exhibit 12 was of a wind tunnel model in connection with the Project 15. Government's Exhibit 13 are all one of the models for the Project 15. Wind tunnel model photos marked Government's Exhibit 14 is a project 15 model. Government's Exhibit 15 is a Grumman model F4. Model drawings—model pictures.

Q. By Mr. Binns: Mr. Dale, will you please, as briefly as possible, explain to the jury what a Zap flap is?

A. A Zap flap is a device to increase the lift of an airplane's wings, to be used for takeoff and landing. Its use in takeoff would be a partial extension of the surface to increase the area of the wing. It might be likened to having a larger wing for takeoff. This will allow the airplane to get off the ground at a slower speed and at a quicker rate.

Upon landing this same device can be further extended, at which time it not only increases the size of the wing, but also changes the effective chamber of the wing, adding a lot [214] of drag to it, more

(Testimony of Harold E. Dale.)

or less to be likened to a brake, so that during the landing operation the airplane can approach the field at a slower rate of speed, and can actually land at a slower rate of speed, and can actually land at a slower rate of speed.

By employing a device of this kind it enables a designer in his original design to make the basic wing smaller, so that when he is up in the air and doesn't need that rapid takeoff and slow land why, he can get the maximum efficiency from his plane by having a lower drag rate; therefore, the airplane can go faster.

Would you want me to describe the shape of it? That would be the action of the Zap flap. The same identical Zap flap is not installed on each model of airplane. Each model would have a slightly different—it would have to be designed to the particular model airplane. If you had a flap designed for a Gruman, it would not fit on a Vought-Sikorski. The Government contract number 83142 covered the Vought-Sikorski airplane, and 4105 covered the Gruman plane. There was no Government number covering Project 13, to my knowledge.

Mr. Lavine: Object to that as calling for a conclusion of this witness.

The Court. He has answered it, not to his knowledge.

Cross Examination

By Mr. Lavine:

At the time that I wrote this letter to Mr. Zap, Mr. [215] Zap was at Wright field, I believe, in

(Testimony of Harold E. Dale.)

Dayton, Ohio. It is a testing field for Army work primarily. Prior to writing that letter and prior to this time, I had been working on this Project 15, just sporadically, and I was just making preliminary sketches and furnishing preliminary data, as requested.

Mr. Zap's engineering data which he asked me to work on concerned the use of this plane for wartime use, and for the purpose of handling bombs and bombers. This plane was to be at least 150 feet, and to carry all kinds of military equipment.

Now the Zap flap which I have described here, I stated that different planes would have different types of flaps. By that I mean that a plane that was large would have to have a larger flap than one that was smaller. And, in that respect, however, the flaps were all the same; it's merely the application of the principles to different sizes of planes. Every airplane has a wing, and all wings are similar. And I might point this out to you. Probably the best answer to it would be the direct comparison of the flap on the OS2U and the flap on the Grumman F4, the two contracts that we worked. The flaps were similar as far as science was concerned. Physically dimensions were not similar. And one flap would not fit on the other airplane. However, the experimental work that would be conducted to test these [216] different flaps would not be altogether identical. Each aircraft that you would install that flap on; that is each model aircraft would have to be

(Testimony of Harold E. Dale.)

individually tested for stability and the proper tail surfaces, for example, the proper ailerons. The whole thing would have to be brought into balance by the proper design of flap, the proper design of tail; so that while the technique is somewhat similar, is the same, and is improved as time goes on from model to model, still each new model airplane that this technique is applied to requires extensive study to bring it into balance so that the thing, when flown, will be as close to perfect as possible.

I did no work on 83142, to my knowledge, before the contract was let. When I came to work for Mr. Zap I at least was told by him he had that contract in force. On 4105 we did some work before the contract was given to us; I am not familiar with contract 11909.

Well, the flap is not on any war plane being used in combat at present. I couldn't possibly see how I could answer that question as to whether I had an opinion as to the value of the flap, in any other way.

I stayed on approximately six weeks after Mr. Zap was arrested.

I addressed a letter to the Government, stating that the project was of great value in the war effort.

Q. By Mr. Lavine: Approximately when did you send [217] that letter to the Government?

By the Witness: It would be approximately—it would be in the month of November, 1942, soon after my return from Washington, D. C., and that

(Testimony of Harold E. Dale.)

was after Mr. Zap's arrest. It [217-a] was soon after my return, I would say, and it would only be approximately, it would be in November, around the 15th or 16th or so. I addressed that letter to the Bureau of Aeronautics of the United States Navy.

I believe I informed them of Mr. Zap's arrest and absence at the time. I more or less asked them for instructions as to how I should proceed, or if I should proceed; the firm was still intact, the men hadn't been paid for two weeks, I wanted some indication from them whether I should assume the responsibility of discharging the men, in Mr. Zap's absence; whether they wanted the work to continue; and I said that I would be glad to go ahead with any of the changes that were required as I had discussed with them on 83142—that is on the Navy OS2U-3075, the airplane that was flying—and pointed out to them that I did not want the responsibility for continuing or not continuing. The point of the letter was instructions from them.

I did not go to the University of Washington at any time during 1942. And my knowledge of these particular pictures that I looked at—I can't tell when those were taken. I don't know whether they were taken in 1941 or 1942.

As far as my work on project 15 is concerned. I don't know who gave that project that number. I knew of it as early as 1941 in that respect.

I went to Washington, D. C., with Mr. Zap in October, 1942. I am not positive of the date. I did

(Testimony of Harold E. Dale.)

go to Washington [218] with Mr. Zap on one occasion, and I met him there on another occasion. It's quite possible that it was October that I did meet him there. I am speaking of Washington, D. C.

I know Bill Butler is a civil service employee for the United States Navy office, who was working as an assistant, I believe, to Commander Scott. He is an engineering inspector, and worked at the Zap office there and inspected the drawings and engineering on these two contracts, from time to time. And Butler would approve these basic or master drawings before they were sent to the sub-contractor for manufacture. The basic design, the drawings that comprised the basic design would be sent to Washington for approval, and upon that basic design certain detailed drawings would be taken off and approved by Butler and sent to the sub-contractor.

[219]

ETHEL H. BOYLE,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maury:

I was the bookkeeper for Mr. Zap—not during last year—since September, from Labor Day until the day of closing. I had charge of the payrolls,

(Testimony of Ethel H. Boyle.)

and I did all the bookkeeping under the direction of Mr. Browne and Mr. Champlin.

Calling my attention to Government's Exhibit No. 7, in evidence, I recognize this cancelled check. I first saw it on September 23rd. I saw it again the day I was to fill it in. I first gave this letter to Mr. Browne. In fact, I know I gave it to Mr. Browne. It was a blank check. I was told to put in the date and to put the account to which it was to be charged, which was 3-15. I handed the check to Mr. Browne in blank. I saw it again when it was given to me to fill in. Well, now I am just a little bit hazy on—I believe it was Mr.—I think Mr. Zap gave it to me to fill in. I am not quite sure, but I gave it back to Mr. Browne to ask the amount to put in. Well, now it comes to me that Mr. Zap came to my desk and gave me the check and I went over to Mr. Browne to find out just how I should fill this in, and I was told the fixed fee was $4,000, and to fill it in, and to fill it in for $4,000. [220]

Well, as far as dates, I wouldn't be able to say. I imagine it was—well, it was some time in October, because I know I later took it over to the bank and deposited it. Well, surely I handed it to Mr. Browne in blank prior to the Daggett trip, because the Daggett trip was in October, and this was in September. I received it back with the instructions to fill it in after the Daggett trip. (Examining) Well, when was this check put through? "10-13." Then it must have been—surely, it was put through 10-13.

(Testimony of Ethel H. Boyle.)

I deposited it in the bank 10-13, October 13th. I typed in the name of the payee. I typed in the whole thing. Mr. Browne told me to type in the name of Mr. McAvoy. William H. McAvoy, and the $4,000, because it was a fixed fee. I made out all the checks after I was hired there.

Check No. 2683 for $250, dated September 25, 1942, payable to E. F. Zap, and No. 2768 for $1010, dated October 14, 1942, payable to E. F. Zap, were posted by me to the check record, Government's Exhibit 57, and charged thereon to account 3-15, which is the flight test account. These two checks were then received in evidence under Exhibit No. 37.

Cross Examination

By Mr. Lavine:

I stated that this check for $4,000 was made out—that the typewritten part of it was typed by me, that is, I typed in "Pay Four Thousand Dollars, $4,000, to the order of [221] —"that is my typing, "William H. McAvoy." And I typed in "Four Thousand Dollars." I typed in the entire check. At the time that the check was handed to me to do the typing in, Mr. Zap's written signature was on the check. I said that I got instructions from Mr. Browne as to how to fill in the check. Mr. Browne furnished me with a typewritten statement as to how the items of charges were to be made. I see here [221-a] Defendants' Exhibit W, a work sheet, written by Mr. Browne. I know Mr. Browne's handwriting. A typewritten sheet of a similar character

(Testimony of Ethel H. Boyle.)

was furnished to me at the place of business. That typewritten sheet had "3-15, flight test", and had over it "Contract 83142, fixed fee basis".

Now, at the time that the check was handed to me by Mr. Browne, I don't recall that Mr. Zap was present. I don't think so. Mr. Zap was in and out. In fact, I had so little to do with Mr. Zap—all my instructions came from Mr. Browne and Mr. Champlin. I really don't recall Mr. Zap being around at the time. I do know I went to Mr. Browne. I gave the blank check at first, and I had "September 23, 1942," typed on the blank check, as well as my "3-15" down in the voucher part. Then when this check was given to me to fill out I asked Mr. Browne how much I should make it out for, and, well, I was told to make it out to McAvoy and how much I should put in. And it was endorsed and the signature was on, as I recall it. But where Mr. Zap was I don't know. That is, it was endorsed on the back by Mr. McAvoy, and Mr. Zap's signature was on the face of the check; but that wasn't anything irregular. Quite often Mr. Zap left signed checks for me so I had my signed checks of Mr. Zap when he was away. Mr. Browne would tell me to whom they were made payable. He would always give me all these bills and I'd use my signed checks for the payment of these bills. My instruction from Mr. Browne was to follow his memorandum on this contract 83142. [222] And in preparing this check I followed that memorandum, and Mr. Browne's in-

(Testimony of Ethel H. Boyle.)

structions to me. This rubber stamp on the back of the check, that was stamped by me. Mr. Zap didn't endorse this check on the back after I filled it out. I took this check to the bank. I made a deposit and went over specially with that check. To my knowledge, I don't think Mr. Zap ever did see it after I filled it out. I wouldn't know.

I worked in the office there keeping the books and records. My duties with reference to the making out of forms of claims——

Q. What were your duties in preparing items for the United States Navy?

That is to say, I am referring now to how you prepared C4 form when you prepared it, and C5 and C5A? Just what you did and how you received your instructions and from whom?

A. Well, C.A.S. 4 forms would be written in pencil and then I would type them and Mr. Champlin would take them down to Mr. Quint's office. Mr. Browne first would write them in pencil. Mr. Quint was a civilian auditor for the United States Navy. And then if there was any correction, if they were not—if they were not allowed by the Navy Department we would get a C.A.S. 5A and I would have to re—Mr. Browne would again go over the records and pencil the C.A.S. 4A, reinstating the claim the way the Navy Auditors wanted it. And if it was not allowed then it was [223] put through as a group, as against Mr. Zap's account. If it was allowed, first then C.A.S. 5A was issued and that

(Testimony of Ethel H. Boyle.)

was our signal to prepare an invoice, and Mr. Browne again would give me a pencilled statement of the invoice, and I would make out the invoice and then it would be mimeographed to make five copies, four copies of the last month or so, and then it was on this ditto machine, and we would get our voucher from that, from the Government. When the invoice was oked we got a paper and then we vouchered it out for him to sign and then we would get our check. I received all of my instructions from either Mr. Browne or Mr. Champlin. The only thing I ever did on my own was the compiling of the payroll, and before then I made Mr. Champlin go over all the time cards, because I wanted and felt he should do something. Mr. Zap never gave me any instructions. I only talked to Mr. Zap twice or three times while I was in his employ, until this case came up. Mr. Zap was so busy. In other words, all the handling of the time cards and the making up of the time sheets, I followed the instructions of either Mr. Browne or Mr. Champlin. I compiled the payroll myself and entered it in the books, but the distribution of the time was given me by Mr. Harold Dale, and then I made out C.A.S. 4's on the payroll; that was the only thing Mr. Browne ever gave me. I made those up myself.

The distribution of time was given to me by Mr. Dale on [224] a mimeographed sheet telling me to which accounts I should charge the various time. Mr. Champlin had this mimeographed sheet pre-

(Testimony of Ethel H. Boyle.)

pared and he was in the office with Mr. Dale. I saw Mr. Champlin and Mr. Dale conferring over these cards. I made out the payroll on Wednesday and they paid Friday, ten days later. Prior to making out the payroll I saw Mr. Dale and Mr. Champlin confer; it was a weekly occurrence; when they conferred I saw time cards in front of both of them, and I saw them looking at those time cards together. On occasions I heard them discuss the allocation of time on those cards. Thereafter, I received the cards themselves in the first instance when I made out the payrolls from the cards and the time, from the time cards, but the distribution of the time in the shop to the men was on a mimeographed sheet that was signed by Mr. Dale. In connection with the entry of those particular items on the books, I received instructions from Mr. Champlin and Mr. Browne both, and I received instructions to enter those particular items in the books by Mr. Zap and Mr. Browne. I followed those instructions.

Mr. Zap at no time ever told me how to enter any of those items in the books. Mr. Champlin's position at the Zap organization was Comptroller. Mr. Champlin wore a big badge saying he was comptroller. I was there at the time Mr. Zap returned from Washington and was placed under arrest. I [224-a] was one of the signers of a letter at that time to the President. I typed it. Looking at this letter which is Defendant's Exhibit Y for identification—I typed

(Testimony of Ethel H. Boyle.)

the letter. And afterwards it was signed by various employees of the Zap organization.

I was in the office immediately after Mr. Zap left Los Angeles for Washington, D. C. daily. I saw conferences—and I saw Mr. Champlin at that time, every day. There were conferences every day going on between him and other employees. Mr. Champlin was conferring with—well, it was in the private office and I wouldn't say who was all there at different times, because I was not in the private office, but there were conferences going on. Mr. Champlin told me, during the absence of Mr. Zap, that he intended to become the head of the Zap organization. He told me that was one of his aspirations.

The Court: Move to strike that out. Strike "one of his aspirations".

Q. By Mr. Lavine: Did he tell you—I guess that is all I can think of right now. That is all. Just a minute.

By the Witness: Now, I mentioned something about Mr. Zap signing checks and leaving them in the blank. He signed other papers, to my knowledge, and left them in blank, such as report papers. He signed papers and letter- [225] heads for different things to be filled in in his absence, as well as checks.

I recognize this form, this photostat marked defendant's AA for identification. It is the form in which the time of the men and the charges were given to me; it was signed by the chief engineer, Mr.

(Testimony of Ethel H. Boyle.)

Harold Dale, and it is on contract NXs-4105. The same thing would be true of contract 83142. Defendant's Exhibit AA was received in evidence.

Mr. Champlin told me that he intended to become president of the Zap organization, the head of it.

Q. By Mr. Lavine: Now, about when was that after Mr. Zap left Los Angeles?

Mr. Maury: Objected to as leading.

The Court: Well, it is cross examination, counsel.

Mr. Maury: I don't think it is proper cross examination, your Honor. He is going into things so far afield from the direct, I am going to ask this witness be made his witness. [426]

Redirect Examination

By Mr. Maury:

Q. Calling my attention again, Miss Boyle, to these two checks, Exhibit 37, in the respective sums of $250 and $1010, both payable to Edward F. Zap, I posted them first into the check record, and then you posted them, in accordance with my instructions, under whatever account they belonged.

A. That is right.

Mr. Lavine: I object to this as not proper redirect examination, your Honor. I don't believe a single question on cross examination was asked this witness about these two checks. We took the position they were not relevant to this case and we didn't ask a single question about them. Now, that is not the proper redirect examination, your Honor.

(Testimony of Ethel H. Boyle.)

By the Witness: Calling my attention to this Government's Exhibit 41 for identification, that is a Job cost ledger.

Mr. Lavine: There has been nothing asked about this ledger on cross examination.

The Court: Are you referring to check 2768?

Mr. Maury: It is 2769, your Honor—2679.

The Court: 26——

Mr. Maury: 2679 for $4,000.

The Court: Wait a minute. There is one. You had two. Is the other check 2268? [226-a]

The Witness: Yes, it is.

Mr. Maury: Yes, sir.

The Court: The witness testified that that was a check for $1010, October 14, 1942, to Edward F. Zap charged to account 315, for the flight test.

Mr. Maury: Let me examine——

The Court: Yes.

Mr. Maury: It was the cost plus ledger for a fixed price?

The Court: Cost plus ledger.

Mr. Maury: My understanding——

The Court: A check, and charged to 315.

Mr. Maury: My recollection of her testimony on cross examination was that she charged these matters to account 315 under the direction of Mr. Browne, and that that was a fixed fee account.

The Court: Well, proceed, if there is any dispute.

Mr. Maury: And I would like to have that straightened out.

(Testimony of Ethel H. Boyle.)

The Court: All right. Proceed.

Mr. Maury: Here is account 315 in this book.

The Court: Yes.

Mr. Maury: That is Government's Exhibit 41.

The Court: Proceed.

Q. By Mr. Maury: Is that the cost plus ledger or the fixed fee? [227]

A. That is the cost plus ledger.

The Court: A little louder.

Q. By Mr. Maury: Which is that?

Mr. Lavine: I object to that as calling for the conclusion and opinion of this witness.

The Court: This witness should know the books she worked on, counsel.

Mr. Lavine: But as to whether—she says it is the cost job ledger.

The Court: It ought to be something. It is not a dictionary. It ought to be something. The witness can tell what it is, counsel.

The Witness: It is the cost job ledger.

Q. By Mr. Maury: Were there two cost job ledgers?

A. Yes, there were.

Q. And which one is that?

A. There is the fixed fee.

Q. That is a fixed fee?

A. No, there is a fixed fee ledger and a cost plus.

Q. And this Exhibit 41 is the cost plus?

A. Cost plus.

Q. Calling your attention to Exhibit 42, what is that?

A. That is the job cost ledger fixed fee.

(Testimony of Ethel H. Boyle.)

Q. Now, in which one did you find account 315? [227-a]

A. In the job cost ledger cost plus.

Q. Calling your attention to that account, and to all entries therein, after September 1, 1942, are those in your handwriting?

A. These are my handwriting.

Q. Yes.

Mr. Maury: I think that is all.

Mr. Lavine: There has been nothing asked about this ledger on cross examination.

By the Witness: That is the cost plus ledger.

Q. By Mr. Maury: There were two cost job ledgers, and which one is that—there is the fixed fee—there is a fixed fee ledger and a cost plus—and this Exhibit 41 is the cost plus. In job ledger cost plus. I find account 315, that is the job cost ledger fixed fee.

Cross Examination
(Resumed)

By Mr. Lavine:

Q. In connection with this ledger, this job cost ledger, Mr. Zap had nothing to do with your making that ledger up?

By the Witness: He gave me no instructions. Mr. Champlin or Mr. Browne gave the instructions as to how to get up this ledger, or what to do. I worked under Mr. Browne. And in getting up this ledger I listed the heading of 3-15 as flight test. In connection with that I wrote that [227-b] word "Flight

(Testimony of Ethel H. Boyle.)

test" there, on page 1 and 2—that is my writing.

Q. There is nothing on there that states whether it is a fixed fee or cost plus, is there?

Mr. Maury: Objected to. The evidence speaks for itself and it is obvious there is not.

The Court: That is right.

By the Witness: To my knowledge, Mr. Zap never did see this ledger, these particular pages in this ledger referring to page 1 and 2 here.

Mr. Lavine: That is all. [228]

MARION SIMON ISRAEL

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Marion Simon Israel.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Binns:

I live at 5942 South Ladera Park, in South Los Angeles. I am employed at Lockheed Aircraft Corporation. I was formerly employed by E. F. Zap Aeronautical Engineers. I was employed by Mr. Zap from February 17, 1941, through the greater part of November, 1942, as stress engineer. As soon as the department expanded to greater importance,

(Testimony of Marion Simon Israel.)

I became chief stress engineer. A stress engineer is responsible for the structural integrity of the airplane; that is to say, he must see that it is strong enough; to make necessary computations to prove that it is strong enough, and to submit reports summarizing the strength calculations. During my period of employment, the stress department at Zap did not do any work along that line, on what is known as project 15. I myself did work on project 15.

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial.

By the Witness: I worked on project 15 approximately [229] 5 days. I wrote a performance report. I don't know whether it was submitted. It was delivered to Mr. Zap's custody. I discussed project 15 with Mr. Zap, a little. That is, may I correct that? I was advised as to my duties in writing this report. I don't believe I actually discussed it back and forth. I don't remember whether Mr. Zap advised me, or he had me advised through someone else.

Cross Examination

By Mr. Lavine:

Q. Mr. Israel, those reports are only passed upon by the Bureau in Washington, and they are of a highly technical nature? A. Yes.

Q. Was that report sent to Washington?

A. I cannot reply—I can't give you a direct answer to that.

I worked in 1941 on certain stress information

(Testimony of Marion Simon Israel.)

that related to contracts in connection with contract 83142. And then subsequently I worked on stress information in connection with contract 4105, in NXs-4105. I am not sure of the exact date NXs-4105 was issued. It was sometime during the early part of 1942; we worked on that airplane previous to that. I was working there when other contracts, under other contracts besides these two, the contracts in the 7500 series—I worked with Mr. Zap during the extreme latter portion of the contract executed by Northrop. I assume that [230] is the contract you are referring to.

I am generally familiar with the value of stress information. I formed an opinion as to the value of these aerodynamics work that was being done by Mr. Zap. My opinion was that the work was highly valuable—highly valuable in the war effort, among other things.

LELAND E. REED

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Binns:

(Witness) My name is Leland E. Reed. I live at 1011 Huntington Drive, So. Pasadena. I am a model maker. I did some work for Mr. Zap for a period

(Testimony of Leland E. Reed.)

of approximately three years ago, I would say, up to about four months ago.

On Government's Exhibit 31 where it says lucite forming, my original bill to Mr. Zap called for freight to Seattle, $45.70; that is prepaying the freight of the models to Seattle.

These photos which are Government's Exhibit 13, I can identify as pictures of the model to which I have referred as a cargo wing.

I believe these pictures, marked Government's Exhibit 9, are pictures of the same model. This is a picture of one of the wings that I referred to as a cargo wing. [231]